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NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, AND 30, 1987

ADDITIONAL SUBMISSIONS FOR THE RECORD

Part 4 of 5 Parts

Serial No. J-100-64

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

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S521-26

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ADDITIONAL SUBMISSIONS FOR THE RECORD

AD HOC COMMITTEE
for
PRINCIPLED DISCUSSIONS OF CONSTITUTIONAL ISSUES

410 Riverside Drive - 82A • New York, New York 10025

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SECRETARY
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September 28, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Senate Judiciary Committee
224 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Biden:

The signers of the attached statement who are of varied political persuasions have different views on the substantive issues discussed by Judge Bork. But all are convinced that Judge Bork's position on judicial restraint is an integral part of the mainstream of American jurisprudence, and that he is well qualified to serve as a justice of the United States Supreme Court.

Sincerely,

Sidney Hook

Sidney Hook
Hoover Institution

Enc.
cc: Senate Judiciary Committee Members

AD HOC COMMITTEE
for
PRINCIPLED DISCUSSIONS OF CONSTITUTIONAL ISSUES

410 Riverside Drive - 82A • New York, New York 10025

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STATEMENT OF SUPPORT

We are witnessing an incredible assault on a distinguished nominee to the Supreme Court, unparallelled perhaps since the battle to prevent Justice Brandeis' confirmation seventy years ago. The undersigned feel that reasoned analysis is needed as an antidote to emotions which may have affected even those Senators who should guide their colleagues towards a wise judgment.

Judge Bork is assaulted for being outside the "mainstream" of American constitutional interpretation and for threatening liberties and rights confirmed by previous decisions of the Supreme Court and by federal and state legislation. This is nothing less than an effort to impose one controversial theory of constitutional interpretation as the only legitimate one, and to exclude as beyond the pale all who challenge it. For the last 15 years or more we have witnessed many 5 to 4 or 6 to 3 decisions on important issues, with majorities and minorities split in their reasoning two or three ways. What is the "mainstream" in such split decisions? It is specious to argue the 5 or 6 Justices in the majority in these decisions represent the mainstream of constitutional interpretation, and that if the decisions were to have gone 5 to 4 or 6 to 3 the other way the Republic and our liberties would be in danger.

Judge Bork stands within a legitimate mainstream of constitutional interpretation, one which includes Justice Brandeis and Justice Frankfurter and other eminent jurists, and which asserts that when the Constitution is silent the legislatures, federal and state, the democratically elected representatives of the people, have the right to speak. It is deceptive to argue that a more restrained interpretation of the liberties protected by the Constitution threatens those liberties. Our liberties have been extended as much by state legislative and congressional action in the past few decades as by

interpretations of the Constitution by the Supreme Court. Our liberties, in the large, are secure, and it betrays scant confidence in the American people -- who are after all the final guarantors of our liberty -- to insist hysterically that one appointment to the Supreme Court, of a scholarly judge, a former professor in one of our most distinguished law schools, a man already once confirmed unanimously by the Senate for the second most important court in the country, threatens those liberties.

We do not know how Judge Bork, were he a member of the Supreme Court, would rule on the issues that seem to arouse the most anxiety: on whether the states have the right to require notice to parents on abortions for children, or whether states may require a moment of silence in school, or how far affirmative action under the Fourteenth Amendment and the relevant statutes can extend, and on other issues. But however he would rule, and however these and other matters which arouse such concern in those fiercely opposed to him come out, the major structure of our liberties will be secure with Judge Bork on the Supreme Court. The mainstream of interpretation of the Constitution includes both those who would give it the most expansive interpretation and allow judges to exercise a wide power to redress wrongs and expand rights as they see fit, and those who see a more limited role for the Court, closer to the text and intention of the framers of the Constitution and the Amendments, and who support a larger role for the democratic branches of government. To read out of the "mainstream" the latter is to shortcircuit what should be a debate over principles, and pronounce an unjustified edict of excommunication from the democratic political community.

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September 21, 1987

MEMORANDUM

TO: Members of the Senate Judiciary Committee

FROM: David Zwiebel, Esq., Director of Government Affairs and General Counsel

SUBJECT: The Bork Nomination

This memorandum is submitted on behalf of Agudath Israel of America in support of the nomination of Robert Bork to the United States Supreme Court.

Agudath Israel of America was founded in 1922. It is today the nation's largest grassroots Orthodox Jewish movement, with tens of thousands of members, chapters in 30 states, and 19 divisions operating out of headquarters in New York City.

Last week, against the backdrop of the ongoing confirmation hearings in the Senate Judiciary Committee, Agudath Israel's board met to discuss Judge Bork's nomination. Agudath Israel has never before taken a public position on any nomination to the Supreme Court, and several members of the board urged that the organization maintain its policy of neutrality on Supreme Court nominations. However, because the Bork nomination has elicited such broad public comment, and especially because so many Jewish groups have spoken out against the nomination and may thereby have created the misconception that "the

Jewish community" is united in monolithic opposition to the principles for which Judge Bork stands, the majority of Agudath Israel's board concluded that neutrality would not be an appropriate response on this occasion.

The extraordinary debate surrounding the Bork nomination has really been a series of two debates: the first over whether Justice Bork's votes would likely lead to results that are "good" or "bad" on a host of controversial public issues; and the second surrounding the overall philosophy of judicial restraint so eloquently espoused by Robert Bork. As detailed below, Agudath Israel has strong views on both those debates.

Part I of the discussion below sets forth the reasons we think the votes Justice Bork would likely cast on a number of controversial issues will have a positive impact on society. Part II, in turn, focuses on that which we believe is even more fundamentally at stake in this nomination: our view that judicial restraint is ultimately in the best interests of all Americans, including minority communities like ours.

I. Judge Bork's Stance on Several Specific Public Policy Issues

From a purely utilitarian perspective, Agudath Israel believes that Judge Bork's presence on the Court could have a positive influence on some of the great public policy issues of our day. Following is a discussion of three of those issues: the First Amendment's prohibition against establishment of religion; "affirmative action" programs that create preferences on the basis of race or sex; and government's role in promoting public morality.

1. Rigidity vs. Flexibility in First Amendment Establishment Clause Jurisprudence: In a 1985 speech before the Brookings Institute, Judge Bork spoke out in support of "a relaxation of current rigidly secularist doctrine" in First Amendment jurisprudence. Agudath Israel agrees that such a relaxation would be a most welcome development.

The specific case that prompted Judge Bork's negative assessment of the Supreme Court's performance in this area was Aguilar v. Felton, decided in 1985, in which a 5-4 majority of the Court struck down a 20-year old New York City program that enabled needy nonpublic school students to benefit from on-premises delivery of the federal "Chapter 1" remedial education program. The Court's rationale, in a nutshell, was that permitting public school personnel to conduct classes on the premises of religiously affiliated schools constituted governmental "establishment of religion," in violation of the First Amendment. Commented

Judge Bork: "This case illustrates the power of the three-part test [employed by the Supreme Court in cases alleging religious establishment] to outlaw a program that had not resulted in any establishment of religion but seems entirely worthy."

If Judge Bork's ascension to the Supreme Court will prompt a reevaluation of Felton and similar cases, it will be cause for celebration. As I testified earlier this year before the House Subcommittee on Elementary, Secondary and Vocational Education, the Felton decision has had a devastating impact on needy nonpublic school children across the country. Consider the situation in New York City. Comparing the program in 1985-86 -- the last school year in which nonpublic school children were being serviced on nonpublic school premises -- with the situation that prevails today in the post-Felton era demonstrates that there is no comparison. In the Hebrew day schools, whose interests Agudath Israel represents, the number of children being serviced is way down. Our figures indicate that approximately 60% of the students serviced in 1985-86 were not serviced in 1986-87.

Lest anyone think that the minority who are being serviced are being serviced well, the fact is that the types of off-premises services that have been arranged for these children have proven far from an overwhelming success. Students who have to put on their coats and boots in the middle of the school day to traipse along to some off-premises site for remedial education suffer displacement, disruption and discomfort -- to say nothing of a special stigma that negates much of the benefit of the Chapter 1 program. Students are not the only ones suffering; many Hebrew day school principals have complained to us about the administrative and logistical problems these off-site arrangements have created. In sum, the children and schools who are receiving off-premises Chapter 1 services have ample reason to rue their "good fortune."

Felton's impact has been felt not only in the nonpublic school sector, which has failed to receive its Chapter 1 due; but even in the public schools, from which vitally important Chapter 1 dollars have been siphoned off to cover some of the administrative expenses incurred in developing costly alternative service-delivery approaches for eligible nonpublic school children. Once again, consider the situation in New York City. The City's Board of Education has leased 70 mobile units to service nonpublic school children, at an annual rental cost of $106,000 per unit, which comes to nearly $7.5 million for the 70. Those costs

were covered this past year by a special New York State allocation but were assumed by the City irrespective of the special allocation. Had the state not come up with the dollars, these administrative costs would have been borne by the Chapter 1 program as a whole, to the detriment of needy children in the public and nonpublic sectors alike.

Moreover, some of the efforts to provide alternative service-delivery methods to nonpublic school Chapter 1 students have engendered considerable inter-community strife and tension. The celebrated fiasco at P.S. 16 in Brooklyn, which pitted needy Chapter 1 eligible hasidic schoolchildren against elements of the local Hispanic and black communities, is still a painful memory. One of Felton's tragic ironies is that it has engendered precisely the types of "political divisiveness along religious lines" that Justice Brennan's majority opinion claimed it was designed to avoid.

These, then, are the problems created by Felton: decreased participation by nonpublic school students in the Chapter 1 program; academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; staggering administrative expenses necessary to implement such off-premises services; and heightened inter-community strife and tension. So long as Felton is the law of the land, these problems will not lend themselves to simple resolution — and needy children will continue to suffer.

Felton is a dramatic illustration of the devastation that can be inflicted by an overzealous judicial reading of the First Amendment's prohibition against establishment of religion. In criticizing this decision and advocating for greater flexibility in the application of the establishment clause, Judge Bork has articulated a more realistic approach to these sensitive issues of church and state. Agudath Israel would certainly welcome that type of approach on the Supreme Court.

2. "Affirmative Action." In an article published in the July 21, 1978 Wall Street Journal, then-Professor Bork criticized the race-conscious admissions policies endorsed in the seminal Bakke decision as offensive to "both ideas of common justice and the 14th amendment's guarantee of equal protection to persons, not classes."

Judge Bork apparently believes that the constitutional, statutory and common law rights of all Americans should be enforced on an equal basis, without regard to race, color, creed, sex or any other irrelevant characteristic. As I have testified before this Committee on another occasion, Agudath Israel shares this view. Ironically, this appears to be an unpopular stance among many who claim to

speak on behalf of some of the very communities that historically have been victims of invidious discrimination.

The controversy over certain forms of "affirmative action" is by no means trivial. It is tied directly to competing viewpoints regarding the proper role of civil rights enforcement in this country. Essentially, the debate is over whether our civil rights laws require equal opportunity or equal results; whether they protect individual rights or create group entitlements; whether they demand color and gender blindness or insist on color and gender consciousness.

These are fundamental questions. Depending on the answers provided, the enduring struggle against discrimination will propel us either down a road leading to a society ordered along racial and sexual lines, where a person's standing in the eyes of government turns on his or her color or gender; or, alternatively, down the principled path of neutrality, where the right to be free from government imposed discrimination inheres in all Americans.

Jews — especially Orthodox Jews, whose dress, diet, and strict Sabbath and Holiday observance set them conspicuously apart from the majority and frequently make them easy targets for discrimination -- tend to be particularly sensitive to the evils of quotas. That sensitivity is borne of many years of bitter experience, in this country and abroad.

Quotas against Jews historically have been an outgrowth of the malignant disease of anti-semitism. Jews were denied education and employment opportunities because religious stereotypes replaced merit-based selection criteria. Of course, similar stereotypes have long served to exclude racial minorities and women from equal opportunity.

The debate today over quotas, concededly, is different. Contemporary calls for quotas are motivated not by venal concerns but by noble ones. The results, however, for the Jewish community and ultimately for all of society, are no less pernicious.

Judge Bork would likely approach the issue of race or gender conscious preferences from the perspective that equal opportunity ought not be sacrificed at the altar of equal results. We believe the Supreme Court would benefit from the addition of an articulate spokesman for that view.

3. Social and Moral Issues: Judge Bork has on numerous occasions indicated his disagreement with the trend in Supreme Court jurisprudence to find newly protected spheres of activity on the basis of some unarticulated "penumbral"

right of constitutional privacy. The effect of this trend has been to remove from the arena of democratic debate the question of whether society should use the law to discourage certain types of "private" conduct. Here again, Agudath Israel thinks that our great nation would be even greater if the constitution were not read to protect activities that have a pernicious impact on social and moral values.

Agudath Israel believes that government is not a neutral actor in the field of morality. The law is a teacher. It conveys certain basic societal attitudes. There are a number of fundamental social values the law should be free to encourage -- for when it does not encourage those values, it inevitably undermines them.

Thus, to cite several examples: Agudath Israel generally would support laws that restrict the availability of abortion on demand (so long as they would permit abortion in situations where termination of pregnancy is required by religious law); laws that would promote traditional family values; laws that would limit the use of certain unnatural forms of birth technology; laws that would place some restrictions on the right of "unlimited personal autonomy" in the context of an individual's refusal to undergo certain life-sustaining medical procedures. When the constitution is read to place these types of issues beyond the purview of legislative debate, it promotes the notion that there is no such thing as public morality — a notion that carries extremely dangerous implications for civilized society.

On the aforementioned issues and a host of others that touch upon fundamental moral concerns, Agudath Israel believes that Judge Bork's vote could lead to positive results for our nation.

II. Judge Bork's Judicial Philosophy

Even more important to Agudath Israel than Judge Bork's views on specific policy issues are his views on the respective roles of legislator and judge. Indeed, were it only for our assessment that Robert Bork's presence on the Supreme Court would likely have a positive impact on the outcome of certain specific cases, Agudath Israel would think twice before issuing this public statement of support -- for a host of reasons.

For one thing, our review of Judge Bork's record suggests that there may well be specific issues on which Justice Bork and Agudath Israel will be on opposite sides of the fence; we fully expect that Justice Bork's vote will disappoint us

from time to time. We are especially concerned that his view of the First Amendment's guarantee of free religious exercise could prove less generous than we would advocate. Our community was most disappointed, for example, when Judge Bork refused to join three of his colleagues on the D.C. Circuit Court (including then-Judge Scalia) who voted to permit an Orthodox Jewish serviceman to wear his yarmulke while in uniform despite an Air Force regulation to the contrary. Goldman v. Weinberger, 739 F. 2d 657 (D.C. Cir. 1984), aff'd 475 U.S. 503 (1985).

Moreover, history has shown that supporting a Supreme Court nomination on the basis of one's assessment as to how the candidate would vote if confirmed is a most risky enterprise. Throughout the history of the Court, a number of prominent justices have confounded the expectations of their supporters and voted in ways that proved a pleasant surprise to their detractors. For Agudath Israel to support Judge Bork merely on the basis of our prediction as to how he would vote on specific cases would be to engage in the type of dice roll that could well yield snake eyes.

Yet another reason we would hesitate to abandon our traditional policy of neutrality on Supreme Court nominations simply because of our expectation that Judge Bork's vote will make us happy more often than not is our recognition that Americans are deeply divided over many of the public policy issues that come before the Supreme Court. Indeed, it is no secret -- and should come as no surprise -- that even within the American Jewish community itself there are profound disagreements as to such questions as the role of religious values in public life, the propriety of race or gender conscious preferences, the state's authority to interfere with a woman's right to terminate her pregnancy at will. The absence of broad public consensus on many of these issues makes it somewhat presumptuous for any individual interest group to attempt to use the forum of a Supreme Court nomination solely to promote its particular policy views.

Finally, and most fundamentally, we believe that a Supreme Court nominee's view on public policy issues is only of secondary importance in considering the merits of the nomination. Assuming a nominee's competence and integrity, the critical inquiry Senators should make in discharging their "advise and consent" responsibility is not whether the nominee is likely to vote yea or nay in any given case, but whether the nominee has a proper appreciation of the judicial function in our constitutional system.

On that inquiry, we submit, Judge Bork stands tall. His judicial record and writings, as well as his testimony last week before the Judiciary Committee,

demonstrate his recognition that the immense power of the judiciary is inherently non-democratic — indeed, often anti-democratic -- and thus best exercised with extreme caution and restraint.

The framers of the constitution created an intricate and carefully calibrated system of government, dividing powers between the executive, legislative and judicial branches. Each of the branches has its own role to play. In our view, the careful allocation of powers among the three branches is what has made the Founding Fathers' experiment such an extraordinary and noble success.

It is said that the judiciary plays a vital role in protecting the minority against the tyranny of the majority. That is certainly true. We readily acknowledge that the Supreme Court has done much to ensure that minority communities across the United States — like ours — have the ability to flourish within a pluralistic society.

By the same token, though, tyranny is not within the exclusive domain of the majority. An all-powerful minority is capable of tyranny as well. When the judicial branch of government oversteps its bounds, and usurps the role of legislative bodies by interpreting the constitution or laws in ways that are at variance with the text and intention of the democratically elected representatives of the people, it acts without the benefit of public debate, without the input of public hearings, and without the legitimacy of public support. This is extremely dangerous.

There are occasions, obviously, when elected representatives legislate foolishly, and where a judicial decision striking down such legislation yields a result that — at least in the short term — is "good." The damage such a decision does to the long-term interests of our constitutional system, however, is immeasurable. Judge Bork understands that when a non-elected entity, consisting of a small number of appointed individuals, attempts to substitute its own view of the common weal for that of the people's democratically elected representatives, society is faced with the most dangerous form of tyranny of all.

That is not to say that legislative bodies should have free reign to impose the majority's will upon the minority. Judges — especially those to whom we accord the title "Justices" -- must be vigilant in safeguarding the fundamental values enshrined in our constitution, even to the point of invalidating laws enacted by democratic majorities. But exercising that responsibility should be done with great caution — perhaps even trepidation — lest the line between judiciary and legislature be obliterated entirely.

The community we represent is a minority community. We have had firsthand experience on the front lines in the battles against discrimination and hatred. No one can accuse us of insensitivity to the needs of minority groups in American society. It is precisely because we have been victims of tyranny that we have learned that a robust democracy practiced to its fullest is ultimately the most effective means of protecting minority rights. Our review of Judge Bork's record and testimony persuades us that he too knows that lesson well.

Agudath Israel of America supports the nomination of Judge Robert Bork to the United States Supreme Court.

885 Third Avenue
New York, New York 10022
Telephone No. (212) 207-1202

September 22, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Biden:

The enclosed statement is submitted by a number of members of The Association of the Bar of The City of New York to repudiate, as wholly unauthorized, the statement just issued last week on behalf of the Association by its Executive Committee. (Executed copies of the statement, manually signed by each signatory, will be in my possession and available for inspection by any interested person.)

If the Judiciary Committee wishes to have testimony concerning the statement, one of the signatories, Gerald Walpin, will be pleased to appear and answer any questions.

Sincerely yours,

Winthrop J. Allegaert

Winthrop J. Allegaert

WJA:bg
Enclosures

cc: To all other Committee Members

D:S097021wja

September 22, 1987

STATEMENT BY MEMBERS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK REPUDIATING THE UNAUTHORIZED ACTION OF ITS EXECUTIVE COMMITTEE IN OPPOSING THE NOMINATION OF JUDGE ROBERT H. BORK TO THE SUPREME COURT OF THE UNITED STATES

Fourteen of the twenty-two members of the Executive Committee of the Association of the Bar of the City of New York recently issued a statement indicating that the Association is opposed to Judge Bork's nomination to the Supreme Court.

The undersigned members of the Association, some of whom support and others of whom oppose the nomination, hereby express their strong disapproval of the statement as being unauthorized by the membership, irregular, and political in nature. We do so because the statement will certainly be misconstrued by the public and by elected officials as representing the view of a majority of the 17,000 member Association. On the contrary, it was not even submitted for approval to any of the standing committees of the Association.

The Charter and By-Laws of the Association do not give to the Executive Committee any authority to speak for the membership in such a matter or to pass on the qualifications of United States Supreme Court nominees. The Committee on the Judiciary is the only committee that has any responsibility to evaluate the fitness of candidates for judicial office. The responsibilities of that Committee are limited to certain courts, not including the Supreme Court, and its evaluation of candidates

has been traditionally based on their intelligence, integrity and judicial temperament. Moreover, Article XIX, Section 2 of the Association's By-Laws expressly states that in evaluating qualifications of candidates for judicial office the Judiciary Committee shall "endeavor . . . to prevent political considerations from outweighing fitness in the selection of candidates for judicial office."

The Executive Committee's statement was issued pursuant to its own recent resolution "authorizing" it to speak for the entire Association in evaluating the qualifications of nominees for the United States Supreme Court. We believe the resolution was without authority in the Association's By-Laws. Moreover, the Executive Committee, conceding that "the quality of Judge Bork's intellect and professional experience is not in dispute," has failed to apply the Association's own standard for evaluating judicial candidates, and has based its opposition solely on the political judgment of a majority of its members.

The undersigned believe that the President and fourteen members of the Executive Committee of the Association, in causing the statement regarding Judge Bork to be issued, have exceeded their authority, and have thereby improperly attempted to utilize the Association to influence the Senate Judiciary Committee's evaluation of the candidate.

Nathaniel H. Akerman
Winthrop J. Allegaert
Eugene R. Anderson
Michael F. Armstrong
Dudley B. Bonsal
Thomas J. Cahill
Bruce F. Caputo
Michael Q. Carey
Richard E. Carlton
John P. Carroll, Jr.
Frederick C. Carver
John W. Castles
John S. Clark
John P. Cooney, Jr.
Paul J. Curran*
Thomas A. Dubbs
J. Richard Edmondson
Thomas E. Engel
Frank W. Ford, Jr.
Stephen Friedman
Donald G. Glascoff, Jr.
Arthur F. Golden
Thomas P. Griesa
John M. Hadlock
Grant B. Hering
Joseph P. Johnston, Jr.
Edmund H. Kerr
Lydia E. Kess
William Lee Kinally, Jr.
Alan Levine
Michael J. McAllister
John J. McCarthy, Jr.
Jay H. McDowell
Denis McInerney
Steven S. Miller
William Hughes Mulligan
Robert Neuner
Richard E. Nolan
John W. Osborn
Milton Pollack
Edward S. Reid
Victor Rocco
Jonathan L. Rosner
Herbert F. Roth

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* Resigned from the Association over this issue on September 16, 1987.

Thomas A. Russo
Jerome Shelby
Thomas Sheridan, III
Richard B. Smith
John E. Sprizzo
Nicholas John Stathis
Laurence N. Strenger
Richard T. Taylor
George G. Tyler
John M. Walker
Gerald Walpin
John J. Walsh
Robert F. Wise, Jr.
Dennis R. Yeager

D:S097038WJA

STATEMENT BY THE ALLIANCE FOR JUSTICE
ON THE NOMINATION OF JUDGE BORK
TO THE UNITED STATES SUPREME COURT

The Alliance for Justice and its Judicial Selection Project appreciate the opportunity to present written testimony on the nomination to the U.S. Supreme Court of Judge Robert H. Bork. The Alliance for Justice is an association of public interest legal groups which focuses on issues of common concern to the public interest community, such as access to the courts, funding and attorneys' fees.

The Judicial Selection Project was organized by a group of individuals affilitated with public interest, civil rights and labor organizations under the auspices of the Alliance for Justice in January of 1985 in response to fears of the politicization of the judiciary. Its purpose is to monitor the appointment of candidates for the federal judiciary and to encourage the selection of men and women who are open-minded, fair and committed to equal justice.

The Alliance and its Judicial Selection Project, (hereafter referred to as the "the Alliance") are keenly interested in the question of the nomination of Judge Robert Bork to United States Supreme Court. This testimony addresses the question whether Judge Bork is qualified to serve on the highest court of the land, whose chief function is the vindication of our constitutional rights if he is opposed to the role of the Court in undertaking that central task.

The Alliance has been particularly interested in promoting access to the federal courts for those who assert that their federal and constitutional rights have been violated. Judge Bork has spoken strongly in a number of dissents, speeches and public statements against availability of the federal courts for the vindication of constitutional rights. Accordingly, this presentation is largely confined to his record in the area of access to the court and to its implications on his qualification to serve as a Justice of the Supreme Court.

THE IMPORTANCE OF JUDICIAL ACCESS

A half century ago, when the development of our modern constitutional law of civil rights and liberties was still in its infancy, the inhibitions on the plaintiff's opportunity for judicial relief were many, frequently borrowed from obscure areas of the law

where policy did not favor litigation. "Standing to sue" was often rigorously confined to a plaintiff who could show immediate and substantial injury flowing necessarily from the conduct he desired to challenge. "Sovereign immunity" was frequently invoked by states and the federal government in efforts to prevent constitutional redress, on the ground that no legislative authorization had been given to allow suit against the government. Rigorous application of "statute of limitations" provisions was yet another device invoked by government defendants to cut off a plaintiff's opportunity to obtain constitutional relief.

Over the past half century this obstacle course impairing vindication of constitutional rights and interests has been largely removed by Supreme Court decisions recognizing that constitutional wrongs call for constitutional redress. Some notable access writings include Barrows v. Jackson 346 U.S. 249 (1953) allowing interested white persons to challenge a racial covenant in circumstances where injured blacks were not in a position to sue; Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971) holding that even in the absence of a statutory right to sue Fourth Amendment violations by FBI agents could be redressed by suit in federal court based on the Constitution itself; and Flast v. Cohen, 392 U.S. 83 (1968) upholding general taxpayer standing to challenge governmental aid to religious schools.

These examples demonstrate the very strong modern principle that where constitutional rights have been or may have been violated, those who can show specific even if small individual injury will be given their day in court. Judicial access for the constitutional litigant has become part and parcel of the seminal principle of Marburr v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) that federal courts will preserve the Federal Constitution against governmental violations.

However, Judge Bork would return to a bygone era, before the recognition of our vital civil rights and civil liberties in modern Supreme Court decisions. Invoking outmoded principles of sovereign immunity and statutes of limitations, and adding his own idiosyncratic "separation of powers" concept, Bork would greatly inhibit the vindication of constitutional rights by the federal courts, by sharply

confining the circumstances under which injured citizens could obtain access to the courts.

JUDGE BORK'S PRINCIPLES LIMITING ACCESS

Judge Bork's speeches and public statements indicate that he would narrowly constrict access to the courts. In testimony before Congress in 1982, Judge Bork stated that he would support "a drastic pruning of jurisdiction of all federal courts." (Hearings on S.1847 before the Subcommittee in Courts and Agency Administration of the Senate Committee on the Judiciary, 97th Congress., 2d Session at 13-14 (1982)). In a speech at the Pound Conference in 1976, then Solicitor-General Bork characterized a large group of cases arising under social welfare legislation as "legal trivia" and argued that this class of cases should be removed from Article III courts. He said, "If these categories of cases [social security, environmental, prisoners, consumer, and worker health and safety actions] were removed from the federal district courts, their dockets would be relieved of well over 20,000 cases..." 70 FRD 238. A broader solution is to leave the decision to the elected branches of government: "The truth is that the more appropriate forum for many disputes now resolved by the judiciary is the democratic political process." 70 FRD 232.

However, his views about the narrow role of the courts are best reflected in his notable dissents on access issues. A number of Judge Bork's access opinions are reviewed in the Public Citizen Litigation Group study "The Judicial Record of Judge Robert H. Bork," (pp. 49, et seq). We focus here on three of those rulings. In each, Judge Bork's dissenting view points up his fundamental rejection of the developed role of the Supreme Court as final guardian of our civil rights and liberties.

In Barnes v. Kline, 59 F. 2d 21 (1985), the Court of Appeals for the District of Columbia Circuit applied established precedents to allow Members of Congress to challenge the constitutionality of a Presidential veto, and then found the challenged pocket veto to have been unconstitutional. Judge Bork filed a lengthy dissent protesting the availability of relief in the federal courts for Congress even where its power to enact legislation has been thwarted by an unconstitutional veto. The basis for his dissent was the view that under Article III of the Constitution the "separation of powers"

doctrine prohibits the federal court from deciding this question. The majority characterized Judge Bork's dissent as follows:

> In a wide-ranging dissent from this panel's decision on standing, Judge Bork propounds the view that neither individual Congressmen nor the houses of Congress may challenge in federal court the President's invocation of the pocket veto power. More broadly, the dissent reads Article III to bar any governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the offical power or prerogatives of the first. 759 F. 2d at 27

The majority went on to demonstrate its claim (p. 27) that "Supreme Court precedent contradicts the dissent's sweeping view that Article III bars any governmental plaintiff from litigating a claim of infringement of lawful function." 759 F. 2d at 27.

The significance of Judge Bork's dissent is in its exposure of his very broad bias against grant of constitutional relief by the courts. No matter how keen and urgent the violation by the President, Judge Bork's view would close the federal courthouse door against relief. As he candidly stated: "As separation of powers and federalism apply in a context like this one, the fundamental consideration appears to be the need to limit the role of the courts in the interplay of our various governmental institutions." 759 F. 2d at 54. In another passage, Judge Bork made even clearer his distaste for the role of federal courts in enforcing constitutional principles, even in such clear cases as the unlawful pocket veto that was before the court in the Barnes case. He asserted:

> While all branches of government are obliged to honor the Constitution, the declaration of constitutional principle with binding effect is primarily the task of the federal courts. If the federal courts can routinely be brought in to pronounce constitutional principle every time the branches of the federal government disagree, every time the federal and state governments contend, then we will indeed become a "principle-ridden," in fact a judge-ridden, society. 759 F. 2d at 55.

Judge Bork's expressed distaste for the constitutional role of the federal courts is answered in forceful terms by the majority:

> The dissent believes... that the separation of powers would be better served in this case by remitting the question involved to a political solution, rather than a judicial one. The dissent understandably leaves unspecified the precise course of events contemplated: "political solution" would at best entail repeated, time-consuming attempts to reintroduce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve Presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the

> disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. 759 F. 2d at 29

Bartlett v. Bowen, 816 F. 2d 695, (D.C. Cir. 1987) illustrates another area in which Judge Bork has employed inventive legal reasoning to deny litigants access to the courts - that of "sovereign immunity." In Bartlett the majority held that jurisdiction lay in the federal district court to review plaintiff's claim that a provision of the Social Security Act was unconstitutional. In construing the Medicare Act's provision limiting judicial review to claims greater than $1,000, the majority concluded that Congress did not intend thereby to preclude the courts from considering constitutional challenges involving lesser amounts.

Judge Bork dissented, warning that under the majority's rejection of the sovereign immunity defense "the number of constitutional challenges will increase." Asserting that Medicare plaintiffs might plead constitutional challenges only in order to obtain jurisdiction that might later prove insubstantial, Judge Bork argued that this would lead to an overload of litigation in the courts. He went on to criticize the majority's reasoning that barring a constitutional challenge to a statute on grounds of sovereign immunity would leave no judicial forum, federal or state, available to hear and decide the constitutional issue.

Judge Bork's dissent in Bartlett is consistent with his objectivism in Barnes, demonstrating that his principal concern is not to afford constitutional review in the federal courts to those who have a claim of injury, but rather to give force to those principles that limit access to the courts even when there is no other way of assuring constitutional compliance.

While these instances are eye-opening, perhaps even more troubling is his recent dissent in Hohri v. United States, 793 F. 2d 304 (1986). Here Bork turns to another strategem - an overly technical reading of the statute of limitations - to deny relief to thousands of Japanese-Americans unlawfully interned during World War II who seek money damages for violations of their constitutional rights. When the original challenge to the internment of Japanese-Americans during World War II was brought before the United States

Supreme Court in Korematsu v. U.S., 323 U.S. 214 (1944), the Supreme Court refused to disturb the racially-based curfew and internment regulations. The Court deferred to the "military necessity" claim made by the government to justify its action.

In the 1970's, the disclosure of documents made clear that there were governmental internal memoranda at the time of the earlier events indicating that there was no military justification for the incarceration. Based on the government's fraudulent "military necessity" alarm in the 1940s, Japanese-Americans brought a damage suit in the Hohri case, and asserted that the statute of limitations did not bar their claim because they had no way of knowing about the government documents when they filed their case in the 1940's.

Judge Bork dissented from the majority ruling allowing the plaintiffs their day in court. Reflecting a general bias against the grant of relief to citizens claiming constitutional violations, Judge Bork stated that:

> "This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in the larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law. The wartime internment around which this case revolves is undeniably a very troublesome part of our history. It is within the authority of the political branches to make whatever reparations they deem appropriate... the issue of whether an additional remedy is available from a court, and if so, which court, should only be resolved on the basis of a sober and fair assessment of the legal claims presented..." 793 F.2d at 313.

The grounds used by Judge Bork in denying relief must be underscored, for he states that "justice in the larger sense, justice according to morality" is for the Congress and the President and not for the courts to provide. This, of course, turns Marbury v. Madison on its head. Furthermore, to say that the courts' role is now to be assumed by precisely those two branches which have on so many occasions transgressed constitutional limits would leave citizens without protection.

In considering the three Bork dissents referred to above, it should be noted that they all arose at a time when under the Supreme Court precedents the entire thrust of constitutional and state law was moving in the direction of increasing access to the courts. If Judge

Bork could write these dissents in the face of Supreme Court cases that generally assure constitutional access to the courts, one can only imagine how much further Judge Bork would go were he elevated to that court and unshackled from precedents.

Other examples abound which illustrate Judge Bork's views limiting access. He has voted to dismiss cases by the Senate, the state of Massachusetts, veterans, an Iranian hostage, Social Security claimants, prisoners, citizens of Japanese dissent, Haitian refugees, the handicapped, an airline, the United Presbysterian Church, homeless citizens of the District of Columbia, and consumer groups. The three decisions reviewed in this statement most clearly expose a basic and sweeping position held by Judge Bork that the courts are exceeding their proper powers and should leave the legislative and executive branches alone even if they are invading constitutional rights and liberties.

He wrote, for instance, in the Bartlett case,

> "The truth is, however, that constitutional doctrines cannot be framed to guard against every hypothetical evil. Much must be left to the wisdom and integrity of elected representatives. Were it otherwise, courts would long ago have had to abandon not only sovereign immunity but a variety of doctrines of justiciabiliaty, such as standing, political question, and the requirement of a case or controversy, that regularly operate to keep courts from constitutional issues." 816 F.2d at 719 n.15 (Bork, J., dissenting).

This passage, and particularly the language underscored, reveals Judge Bork's fixed view of the federal judiciary as supernumerary. We are to depend on the "wisdom and integrity" of our elected representatives to protect our constitutional rights; presumably, if that wisdom and integrity fails, we may look to the political process to provide us with new and better representatives. In Judge Bork's view, Federal courts have, at best, a marginal role to play in the matter."

In a speech by Chief Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia on April 2, 1987, she argued that Judge Bork's position is truly ominous and a threat to the future enforcement of civil rights and civil liberties by the courts. Far from endorsing the "separation of powers" suggestion by Judge Bork, Judge Wald finds in the constitutional history and debates precisely the intention to assure that federal courts would provide a check and

balance against abuses and excesses by the executive or the legislature.

Examining Judge Bork's dissent in Barnes, Chief Judge Wald finds the "reappearance in a separation of powers guise of what we had come to think was the fading political question doctrine, whereby courts eschew cases... The doctrine has always troubled legal scholars because it is a deviation from the Marbury v. Madison mandate to courts to say what the law is..."

Chief Judge Wald continues,

> Thus when we encounter present-day separation of powers rhetoric about "the properly limited role of courts in a democratic society" or "the constitutional and prudential limits to the powers of an unelected unrepresentative judiciary in our kind of government," we must place it in historical perspective. Usurpation of power by the judciary or its undemocratic origins were not major concerns of the Framers. They looked to the Judiciary as the branch primarily entrusted with protecting the liberties of citizens from the excesses of the other two branches. (p. 17).

In concluding Chief Judge Wald warns that there is a grave danger to our rights from a movement by judges (such as Bork) undertaking to retreat from their constitutional responsibility. She writes,

> It is hard to now predict the future direction of separation of powers. Will it be used by those determined to reinforce the Judiciary's role as the protector of individual rights or by those who would erect it as a barrier to judicial oversight of the actions of the other branches?... Today many believe there is as much danger frm a movement by judges themselves calculatingly to retreat from that constitutional responsibility through unyielding deference to an extreme view of separation of powers, as there is that they will, by some as yet undefinable means, assume tyrannical power over government.

In sum, the opinions discussed above and Judge Wald's analysis demonstrate that Judge Bork's view of what federal courts should do, and to whom they should be open, is dangerously different from what Americans have come to expect, and from what our Constitution intended.

THE QUESTION OF QUALIFICATION

Can such a judge properly be elevated to our high court, given his rejection of that court's highest constitutional functions? Supporters of Judge Bork repeatedly assert that judicial views and constitutional views are not a proper subject for consideration in confirmation of one who is legally qualified to serve as a judge. We believe this view is far too narrow. First there must be present the

skills necessary for performance of the duty involved. Second there must be the willingness to perform that duty.

Whatever one may conclude concerning Judge Bork's skills as a jurist, there is more than a serious question whether he is willing to perform the high constitutional functions of the Supreme Court under our basic charter. At one time the Supreme Court had only minor constitutional functions. But in this Century constitutional adjudication has become the principal task of the Court and properly so.

Why should one who rejects the key constitutional function of the Court be appointed to serve on that Court? It seems clear to us that willingness to do the job that the Court is principally engaged in is an indispensable ingredient of "qualification" to serve on the Court. As a federal jurist, Judge Bork has every right to his view that the courts should no longer play their historic role. But as an applicant for a seat on the United States Supreme Court Judge Bork must show that he is willing and ready to do the constitutional task that is now the major work of the Supreme Court. He cannot make that showing. For if he does not reject Marbury v. Madison itself, then at least by his philosophy he rejects the meaningful application of Marbury in cases involving our other basic civil rights and liberties.

For these important reasons, we urge the Senate to reject the nomination of Robert Bork to the United States Supreme Court.

TESTIMONY

of

Albert Mokhiber

Director, Legal Services Department

American-Arab Anti-Discrimination Committee

Senate Committee on the Judiciary

US Supreme Court Nomination of Judge Robert Bork

October 5, 1987

I am the Director of the Legal Services Department for the American-Arab Anti-Discrimination Committee, a civil rights organization headquartered in Washington, D.C., with over 60 chapters across the United States comprising more than 17,000 paid members. ADC is the largest grassroots Arab-American organization in the United States.

The ADC mandate includes defending the rights of the Arab-American community as well as promoting the rich heritage and culture of our Arab ancestry. ADC offers pro bono legal services to its membership, primarily in the areas of civil rights and immigration law. We are pleased to state that since the inception of ADC in 1980 we have achieved many accomplishments in the legal arena. In fact, our most important victory came this year in a unanimous US Supreme Court decision, St. Francis College v. Majid Al-Khazraji, upholding the rights of Arab-Americans to receive the protections of the Civil Rights Act of 1866. ADC not only filed an amicus brief in this case, but we were also honored with a seat at the counsel table during the oral arguments before the Court.

This case not only broadened the protections for Arab-Americans but for other ethnic minorities in the country as well. ADC also filed an amicus curiae brief in the tandem case heard by the Supreme Court, Shaare Tefila Congregation

v. Cobb, et al., which sought the same coverage under the 1866 Act for Jews.

Thus for the first time in history, Arab-Americans went before the US Supreme Court, and fortunately came away victorious. The case was also historic since it brought together Arabs and Jews on a common issue --- combatting discrimination. And again, today we join with all of the other civil rights organizations to voice our shared concern about issues of law and justice.

In particular, we have come to the conclusion that we must oppose the nomination of Judge Robert Bork to the US Supreme Court and implore this distinguished committee to do the same.

The ADC bases its opposition to Judge Bork's appointment on several grounds. The legal opinions of Judge Bork on the United States Circuit Court of Appeals for the District of Columbia evidence a clear politicization of the bench with his particularly conservative ideology. As a civil rights organization, ADC is of the belief that all judges, especially US Supreme Court justices should refrain from such judicial activism and instead decide cases solely on the legal merits involved.

Further, Judge Bork not only has made political decisions from the bench, but he has made dangerous ones which compromise the very rights of the American public and the US Constitution. These decisions include eroding the civil rights of minorities by opposing affirmative action and voting rights. On the other hand, he is not opposed to poll taxes, which have historically been used to discourage Blacks from voting. In fact, Judge Bork in 1963 opposed civil rights laws that required public hotels and restaurants to serve Blacks. He later disavowed this position ten years later when he was being considered for the position of Solicitor General by the Nixon Administration.

Judge Bork fares no better on Constitutional issues as is evidenced by his position that only speech necessary to the political process is protected by the First Amendment. Thus, literary and scientific writings are not guaranteed, except where they contribute to the political process.

In the area of women's rights Judge Bork has exhibited an intensely insensitive and archaic understanding. In one case he held that sexual harassment is not a form of sexual discrimination. He also stated that the plaintiff who complained of sexual advances "wore provocative clothing (and) suffered from sexual fantasies". This comment was commonly used in many rape trials in an attempt to blame the victim. Fortunately, these views were unanimously rejected by the US Supreme Court on appeal.

Finally, the testimony of Judge Bork before this committee two weeks ago, has failed to convince us that he will not employ his personal philosophy in deciding new cases in areas of settled law, such as civil rights. His testimony revealed a flip-flop of positions on issues of grave importance which has caused many, including the ADC, great concern about his sincerity. In deed, ADC fears that in the very same year that we received our first victory at the Supreme Court, such protections could be subject to attack, if not reversal, by someone like Judge Bork.

In conclusion, we respectfully request that this committee reject the nomination of Judge Robert Bork as associate justice to the US Supreme Court.

October 5, 1987

Albert Mokhiber
Director
Legal Services Department

TESTIMONY OF SARAH HARDER

PRESIDENT,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

BEFORE THE SENATE JUDICIARY COMMITTEE
IN OPPOSITION TO THE NOMINATION OF
ROBERT H. BORK
TO THE POSITION OF ASSOCIATE JUSTICE
OF THE U.S. SUPREME COURT

OCTOBER 1, 1987

Mr. Chairman and Members of the Committee, I am Sarah Harder, President of the American Association of University Women (AAUW). It is an honor and pleasure for me to present testimony on behalf of AAUW concerning the nomination of Robert H. Bork to the position of Associate Justice of the United States Supreme Court.

The American Association of University Women is the oldest and largest organization of college-educated women in the United States. A non-partisan, national organization of 150,000 members, AAUW counts among its members Republicans, Independents and Democrats. For over 100 years, AAUW has been a responsible voice promoting individual liberties for all Americans.

We are sometimes called the arch-moderates of the women's rights movement. We believe our organization brings a moderate voice to the Bork debate.

I am here today to publicly reiterate AAUW's strong opposition to the nomination of Robert H. Bork to the Supreme Court. We believe that the confirmation of Robert Bork would have unprecedented and profound consequences for the legal rights of Americans.

The controversy over President Reagan's nomination of Robert H. Bork to the U.S. Supreme Court has provided the nation with a civics and history lesson that is most appropriate in this year of the Constitutional Bicentennial. Discussions about the need to maintain the ideological balance of the Court and the "proper" role of the three branches of government are flourishing in light of the confirmation battle. The appointment involves much more than esoteric legal arguments, however. It is no overstatement to say that Justice Lewis F. Powell's successor will cast the vote that determines whether the

Supreme Court functions as the protector of indivdual liberties, or whether it is responsive not to the rights of individual Americans, but rather to those in positions of power.

AAUW believes that Robert Bork's demonstrated record indicates a disposition against protection for individual citizens. While the "tyranny of the majority" holds sway in Congress and in the White House, the judiciary has been a source of protection for disenfranchised minorities. Bork's record should, therefore, be of special concern to traditionally disadvantaged groups -- women, the poor, and racial and ethnic minorities -- who are underrepresented in Congress and in executive agencies, and whose rights will be protected by the courts, or not at all.

AAUW has a long and proud history of advancing the research, education and legal rights of women. Therefore, Robert Bork's narrow and limited views on the Constitutional rights of women greatly concern our members. Bork has repeatedly criticized the Court for improperly extending Constitutional rights of due process and equal protection. Robert Bork also interprets narrowly several key statutes that afford women critical protections in the areas of employment and health.

In the absence of a federal Equal Rights Amendment, which Bork publicly opposes, legal rights for women depend largely on Congressional action and the Court's interpretation and inclusion of gender discrimination under the Fourteenth Amendment. Bork's narrow interpretation of the Fourteenth Amendment coupled with the critical "swing" vote position on the Court he would fill, could well lead to a serious erosion of equal benefits, protections and statutory rights women have painfully achieved.

Robert Bork does not believe that the U.S. Constitution contains a right to privacy. The principle of a constitutionally guaranteed right to privacy was first articulated in Griswold v. Connecticut, a decision upholding the legal right to private use of contraceptives. Bork has been outspoken in opposition to the privacy concept, terming the Griswold decision "unprincipled" and "specious." Bork labeled as "unconstitutional" the Roe v. Wade decision which established the legal right to abortion.

AAUW believes that the right to seek legal redress for grievances is a fundamental tenet of American life. A

1986 University of Miami law review survey found that Bork denied access to individual plaintiffs in 10 out of 11 cases involving Constitutional questions. The petitioners Bork has argued do not have standing in particular cases range from the U.S. Senate and the State of Massachusetts to social security claimants, handicapped citizens, Haitian refugees, and Americans of Japanese ancestry who were interned during World War II. With greatly restricted access to the courts, a major avenue for securing and preserving personal liberties would no longer be available.

We have carefully reviewed Robert Bork's testimony before the Senate Judiciary Committee on the questions of equal protection, privacy, free speech and related civil rights issues. Although Bork appeared to modify and expand his record in his testimony, we remain unconvinced of his ability to alter three decades of radical thinking, writing and speaking on these and other fundamental Constitutional questions.

Let us examine the contrasts between Bork's recent testimony and his previous--and prolific--record.

o His testimony on equal protection for women: For the first time, Bork said he believes that the Fourteenth Amendment guarantees might bar some forms of governmental sex discrimination.

His record: He has criticized the Court for improperly extending Constitutional rights of due process and equal protection; in 1985 and as recently as June 1987 he reiterated his belief that the equal protection clause applied only to racial and ethnic discrimination.

Bork wants to use his own version of a "reasonable basis" test in determining if gender-based discrimination is justified. Yet, since 1971 the Supreme Court has abandoned this standard in favor of a more careful or "heightened" scrutiny standard in reviewing government policies that treat men and women differently.

o His testimony on racial discrimination: Bork declared he abhors it and views Brown v. Board of Education (1954) as "perhaps the greatest moral achievement of our Constitutional law." The decision was based on the equal protection clause of the Fourteenth Amendment, which applies to actions by state and local governments.

His record: In a similar 1954 case affecting District of Columbia schools, which were under federal jurisdiction, the Court in a unanimous ruling outlawed segregration in D.C. schools under the due process clause of the Fifth Amendment. Because Bork has no rationale for the D.C. case and can find no Constitutional basis for it, he opposes the decision, though he has stated he would not seek to overturn it.

Bork's legal actions have opposed fair housing and affirmative action remedies; he has also objected to rulings affirming "one man, one vote" and overturning the Virginia poll tax. He reiterated these objections before the Senate Judiciary Committee.

- His testimony on free speech: Bork for the first time indicated that he finds acceptable the Brandenburg v. Ohio (1969) ruling that speech advocating lawlessness was protected if illegal action was not imminent. Further, he also stated, for the first time publicly that the First Amendment also protects moral discourse, scientific speech, news, opinion and literature.

His record: Previously he assailed Brandenburg. In 1971 he maintained the First Amendment explicitly protected only political speech; in 1979 he reiterated his doubt that other forms of speech are similarly protected. In a 1985 interview, he said his First Amendment philosophy was essentially unchanged from 1971.

- His testimony on precedent: "A judge must give great respect to precedent... judges respect precedent in all cases, somewhat less in Constitutional matters" than when dealing with laws passed by legislative bodies.

His record: In a 1985 speech at a Buffalo, NY, college, he remarked, "I don't think in the field of constitutional law precedent is all that important." He explained that if the Supreme Court misconstrues the Constitution, there is no recourse from the decision but if one is convinced that a prior court has misread the Constitution, "it is your duty to go back and correct it. I don't think precedent is all that important."

In twelve of twenty subjects areas or cases covered during the hearings, Bork made statements that appear to be different from other statements he has made within the last two years.

Ultimately, we must rely on a well-documented series of judicial opinions, public testimony and writings as the best indicator of Judge Bork's philosophy and probable decisions on the Supreme Court.

In sum, Mr. Chairman, Robert Bork's record distinguishes him as a judicial activist whose political philosophy shapes his judicial decision making. Robert Bork's extreme political views place him outside the mainstream of jurisprudence, thought and public opinion. Replacing a judicial centrist, Justice Powell, with an ideological activist is simply not acceptable to the majority of Americans, who support the civil rights and liberties progress which the United States has painfully achieved in this century.

AAUW calls upon you to assert your Constitutional and elected function of protecting the rights of <u>all</u> Americans by opposing the nomination of Robert H. Bork.

Thank you.

STATEMENT

ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

SUBMITTED TO THE
SENATE COMMITTEE ON THE JUCICIARY
FOR THE RECORD OF ITS HEARINGS ON
THE NOMINATION OF ROBERT BORK
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

OCTOBER 5, 1987

PREPARED BY THE

AMERICAN CIVIL LIBERTIES UNION
132 WEST 43RD STREET
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In his 30 hours of testimony, Judge Bork for the first time attempted to disavow key elements of his extreme judicial philosophy,[1] preferring instead to present himself as a moderate centrist whose views on critical civil liberties issues and the role of the Supreme Court in protecting minority rights place him "about where the current Supreme Court is."[2] This report illustrates how, on a closer analysis, Judge Bork's "confirmation conversion" or "recantations" are more apparent than real.[3] For example:

in rejecting the liberty clause of the Fourteenth Amendment,

in articulating how the Court should apply the equal protection clause in race and sex discrimination cases,

in continuing to reject privacy rights under any theory of constitutional interpretation,

in reiterating imperial executive powers in matters of national security, and

in stating a narrow basis for adhering to judicial precedent Judge Bork clings to his philosophy of "original intent", he is faithful to his view that if rights are not specifically

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[1]Robert Bork's judicial philosophy as he had presented it prior to the confirmation hearings is described in the ACLU's report on the Civil Liberties Record of Judge Bork," September 9, 1987 (Attachment A).

[2]Sept. 16, 1987, Afternoon Session at 3-1.

[3]For a full discussion of Judge Bork's testimony, see "The Essential Judge Bork," October 2, 1987 (Attachment B).

enumerated in the Constitution then they do not exist, and that the Constitution, rather than posing a series of checks on majority tyranny, is a document which permits the majority to impose its moral views on minorities.

Judge Bork, despite obfuscation and apparent recantation, remains a radical jurist with an extreme philosophy which would seriously alter the role of the Supreme Court in protecting civil rights and liberties--grounds which we believe require the Senate to reject his nomination to the United States Supreme Court.

Judge Bork's Fundamental Philosophy

Judge Bork's testimony, if taken at face value, would reflect a dramatic about-face from a lifetime of legal thinking. During his entire professional life, Judge Bork has vigorously and repeatedly criticized well-settled constitutional doctrine, using such extreme and unequivocal language as "utterly specious,"[4] "pernicious,"[5] "unprincipled,"[6] and "wholly

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[4]Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L.Rev. 823, 832 (1986).

[5]The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 308, 310 (1982) (statement of Professor Bork).

[6]Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana L.J. 1, 9 (1971).

unjustifiable."[7]

Judge Bork's stinging criticisms of landmark Supreme Court cases rest on his radical view of the Constitution, which all but eliminates the Supreme Court's role as protector of individual liberty. This view gives minimal value to liberty and equality as guaranteed in the Due Process and Equal Protection Clauses of the Constitution and maximum value to majority will. Judge Bork has made clear the basic tenets of his judicial philosophy:

- That the Constitution's primary purpose is to facilitate majority rule;[8]
- That the majority's liberty includes the liberty to impose moral values on unwilling minorities;[9]
- That the Supreme Court can protect only those rights specifically enumerated in the Constitution and that original intent is the only legitimate basis for constitutional decision-making;[10]
- That the Fourteenth Amendment protects only against official discrimination by the states and only on

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[7]The Human Life Bill: Hearing on S.158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, supra, at 310.

[8]See generally Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. passim.

[9]See generally, Bork, Unpublished Speech, Brookings Institute, Washington, D.C. (Sept. 12, 1985); Bork, Unpublished Speech, University of California, Berkeley, Cal. (April 29, 1985); Bork, Unpublished Speech, "Religion and the Law." John M. Olin Center for Inquiry Into the Theory & Practice of Democracy, University of Chicago (Nov. 13, 1984).

[10]Bork, The Constitution, Original Intent, and Economic Rights, supra, 23 San Diego L.Rev. at 823.

behalf of racial and perhaps ethnic minorities;[11]

- That the Equal Protection Clause of the Fourteenth Amendment provides no protection for women and other disadvantaged groups;[12]

- That the Due Process Clause of the Fourteenth and Fifth Amendments provides only procedural protection and is not a source of substantive rights such as a right of privacy;[13] and

- That the First Amendment protects only speech relevant to the functioning of the republic and permits the states to restrict the terms of political expression and to ban calls for civil disobedience or advocacy of "abhorrent" doctrine.[14]

Until the hearings, Judge Bork recognized that his articulated views placed him well outside the mainstream of contemporary legal thought.[15] Moreover, Judge Bork's peculiar

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[11]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 11-17.

[12]Bork, Interview with Worldnet, United States Information Service 1, 12 (June 10, 1987).

[13]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 11-12.

[14]Unpaginated Transcript, Public Affairs Television, Inc., Movers: In Search of the Constitution #107 Strictly Speaking, Attorney General Edwin Meese and Judge Robert Bork (Airdate May 28, 1987); Bork, Unpublished Speech, "The Individual, the State and the First Amendment," Univ. of Michigan (1979).

[15]For example, in 1982 Bork wrote:

> My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. Just how much of a minority may be seen by the fact that a visitor to Yale who expressed interest in debating my position was told by one of my colleagues that the position was so passè that it would be

originalist philosophy required him to argue, again and again, that "broad areas of constitutional law ought to be reformulated."[16] As recently as this year, Judge Bork stated:

> ... I would think our originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent, by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing the framers intended.[17]

At the hearings, however, Judge Bork's testimony offered unexplained and sudden departures from his articulated philosophy, putting Judge Bork in conflict with prior philosophical views on issues ranging from stare decisis to a woman's right to equality.

If Judge Bork has in fact changed his mind about the role of the courts and the rights of individuals, that "evolution" must be seen as abrupt. As recently as June 1985, Judge Bork said: "[M]y views remain about where they were" when he was a professor at Yale Law School.[18] That same year, Judge Bork also said that he adhered to the ideas articulated in the 1971 Indiana Law

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intellectually stultifying to debate it.

Bork, "The Struggle Over the Role of the Court," National Review 1137 (Sept. 17, 1982).

[16]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 11.

[17]Transcript, Speech to Federalist Society, Washington, D.C. (Jan. 31, 1987), p. 126.

[18]Lacovara, "A Talk with Judge Robert H. Bork," 9 District Lawyer 29, 31 (May/June 1985).

Journal -- an article rife with unconventional, reactionary views about the Constitution -- and that he had "finally worked out a philosophy which is pretty much expressed in that piece."[19]

Even with Judge Bork's "conversion" to certain Supreme Court doctrine and his "recantation" of more extreme elements of his philosophy, Judge Bork's testimony reaffirms that the nominee holds many radical views about the Constitution and the rights of all Americans. Although Judge Bork tried to deemphasize some unpopular views, he clung fast to his basic philosophy.

Judge Bork continues to define equality in narrow terms and the role of the Supreme Court in protecting individual liberty as very limited, providing no protection to unenumerated rights. The highest liberty for Judge Bork is that of the majority to impose its moral values on the minority.[20] His narrow vision of

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[19]McGuigan, Judge Bork Is A Friend of the Constitution, 11 Conservative Digest 91, 95 (Oct. 1985).

[20]Bork in no way retreated from the extreme deference he would accord to the majority:

> If the constitution says "you may not do this to this minority" ... then that's fine. The Constitution has made the determination that the rights are to be there and not with the larger group. ... That's exactly what Constitutional Law is about.
>
> If a court, without guidance from the Constitution ... redistribute[s] the liberties ... it is wrong to say they have just increased liberty. They may or they may not [have]. ... But ... a court has no authority to do that without Constitutional amend[ment]. ... [A] court ought to take [the liberty to govern themselves] away from us if the constitution says so. It ought not if the Constitution does

the Fourteenth Amendment would provide only limited protection against most forms of discrimination and relegate claims of inequality to local legislatures.

In short, his views threaten individual liberty. His philosophy is fundamentally inconsistant with the function of the Supreme Court in protecting individual rights. Robert Bork is not qualified to serve on the Supreme Court.

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not say so. It should leave us the liberty of electing our representatives and senators, and having them make public policy for us.

Sept. 17, 1987, Afternoon Session at 46-2 - 47-1.

Attachment A

REPORT ON THE CIVIL LIBERTIES RECORD OF JUDGE ROBERT H. BORK

PREPARED BY

AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
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Revised 9/9/87

REPORT ON THE CIVIL LIBERTIES RECORD OF JUDGE ROBERT H. BORK

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REPORT ON THE CIVIL LIBERTIES RECORD OF JUDGE ROBERT H. BORK

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REPORT ON THE CIVIL LIBERTIES RECORD OF JUDGE ROBERT H. BORK

Pursuant to ACLU policy, established by the Board of Directors of the American Civil Liberties Union, this report examines the record of Robert H. Bork, Judge on the U.S. Court of Appeals for the District of Columbia Circuit, who has been nominated for the position of Associate Justice of the United States Supreme Court. The memorandum reviews Judge Bork's authored opinions while on the bench[1/], his unpublished speeches (many given in the past five years), as well as his academic writings, congressional testimony, popular articles, speeches, and interviews.[2/] Where Judge Bork has disclaimed a position previously taken, that is noted; otherwise, it is assumed that Judge Bork still adheres to these published views.

I. INTRODUCTION

Robert Bork's extreme judicial philosophy is reflected in a series of speeches, articles, testimony and court decisions. If his philosophy prevails, it would radically reduce the role of the Supreme Court and seriously diminish the force of the Bill of

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1/ The memorandum focuses on opinions which Judge Bork wrote (whether for the majority, concurring or in dissent), in order to distill Judge Bork's judicial philosophy from his own words. The memorandum does not address opinions which Judge Bork silently joined.

2/ Judge Bork provided texts of his unpublished speeches to the Senate Judiciary Committee. Copies are available from the ACLU Washington Office, 122 Maryland Ave., N.E. (202-544-1681) as are copies of all of Judge Bork's published articles and other writings. A complete list of this material is available from the ACLU.

Rights and the liberties it protects.

Judge Bork's view of the Constitution is that it creates a governmental structure designed, with few exceptions, to promote the majority will at the expense of individual rights.[3/] This view is summarized by a quote from Chesterton, which he repeatedly cites:

> What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make law is what constitutes a free people.[4/]

In Judge Bork's opinion, the Constitution must be interpreted almost exclusively in light of its majoritarian purpose. This means that the only individual rights protected against the majority are those explicitly and unmistakably mentioned in the Constitution and the Bill of Rights. As a result, Judge Bork assigns a sharply limited role to the Supreme Court. Any doubt as to the constitutionality of a statute should be resolved by permitting the legislature to have its way. The Court may strike down a statute only if there is no doubt that a provision of the Constitution is clearly violated. Moreover, legal concepts, such as standing and justiciability, should be defined to reduce substantially the number of cases that the Court may accept for review.

Judge Bork sees the primary role of the Constitution as insuring that the majority is able to impose its moral judgments

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3/ See generally Bork, Neutral Principles and Some First Amendment Problems, 147 Indiana L.J. 1 (1971) [hereinafter "Neutral Principles"].

4/ Bork, Morality and the Judge, Harper's 28, 29 (May 1985).

on the rest of society. His conception of the Court's role is radically different from most, if not all, of the Justices who have sat on the Court in the past forty years. In fact, Judge Bork has specifically rejected a long list of landmark constitutional rulings by the Supreme Court.[5/] These rulings, which he has described as "pernicious,"[6/] "unprincipled,"[7/] and "utterly specious,"[8/] include the following:

-- a decision striking down a statute making it a crime for married couples to use contraceptives;[9/]

-- a decision barring judicial enforcement of racially restrictive covenants;[10/]

-- a decision protecting illegitimate children against arbitrary discrimination;[11/]

--a decision protecting the right to use obscene language for political purposes;[12/]

5/ See notes 10-22, infra.

6/ The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 308, 310 (1982) (statement of Professor Bork).

7/ Bork, Neutral Principles, supra, at 9.

8/ Id.

9/ Griswold v. Connecticut, 381 U.S. 479 (1965); see Bork, Neutral Principles, supra, at 11.

10/ Shelley v. Kraemer, 334 U.S. 1 (1948); see Bork, Neutral Principles, supra, at 15.

11/ Levy v. Louisiana, 391 U.S. 68 (1968); see Bork, Neutral Principles, supra, at 12.

12/ Cohen v. California, 403 U.S. 15 (1971); see Bork, "The Individual, the State and the First Amendment," Unpublished Speech, Univ. of Michigan (1979) (reported as 1977 or 1978).

-- decisions giving First Amendment protection to speech advocating violence for political reasons as long as there is no clear and present danger;[13]/

-- decisions striking down state abortion laws;[14]/

-- a decision holding unconstitutional a law requiring the sterilization of habitual criminals;[15]/

-- decisions striking down state poll taxes and literacy tests;[16]/

-- decisions upholding affirmative action plans in various circumstances;[17]/ and,

-- decisions striking down state laws permitting prayer in the schools or permitting use of government funds for public employees to teach in parochial schools.[18]/

13/ E.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); see Bork, Neutral Principles, supra, at 23.

14/ E.g., Roe v. Wade, 410 U.S. 113 (1973); see The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, supra, at 310.

15/ Skinner v. Oklahoma, 316 U.S. 535 (1942); see Bork, Neutral Principles, supra, at 12.

16/ Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); see Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. at 5, 16-17 (1973) (statement of R. Bork).

17/ Regents of the University of California v. Bakke, 438 U.S. 265 (1978); see Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8, col. 4 (July 21, 1978).

18/ Aguilar v. Felton, 473 U.S. 402 (1985); Engel v. Vitale, 370 U.S. 421 (1962); see Bork, Unpublished Speech, Brookings Institute, Washington, D.C. (Sept. 12, 1985), at 3.

Indeed, Judge Bork questions whether the Framers intended the Court to assume the power to review the constitutionality of statutes.[19/] He is sure, however, that the power of judicial review should generally be exercised to facilitate the ability of the majority to impose its moral views on the minority.[20/]

As Judge Bork interprets the Constitution, few rights are shielded from the majority's judgments. If confirmed, and if his views prevail, civil liberties in this country would be radically altered and the structure of government radically changed. The majority in each state could impose its moral values on the private lives and decisions of all citizens. Individual liberty would have a radically different meaning in each state.

II. JUDICIAL APPOINTMENTS: THE ROLE OF IDEOLOGY

Throughout most of our history, the Senate has engaged in a "practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."[21/] Indeed, the Framers rejected giving the Senate only a limited veto over the President's nomination, voting down a proposal that the President appoint unless "disagreed to by the Senate."[22/] Both the text of the Constitution, as well as the history of the

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19/ See Bork, Judicial Review and Democracy, Society 5 (Nov.-Dec. 1986); Bork, Styles in Constitutional Theory, 26 S. Texas L.J. 383 (1985).

20/ Bork, Morality and the Judge, supra, at 28.

21/ Rehnquist, The Making of a Supreme Court Justice, 29 Harv. L. Rec. 7 (Oct. 8, 1959).

22/ 4 The Founders' Constitution 32-33 (Kurland & Lerner, eds. 1987).

Appointments Clause, demonstrate that the Senate has and should exercise a shared role with the President in the confirmation process.

A. History of the Appointments Clause

The Appointments Clause expressly provides for consensus by the two elected branches of government in the confirmation process. Article II, section two of the Constitution states that "the President ... shall nominate, and by and with the [a]dvice and [c]onsent of the Senate shall appoint ... Judges of the Supreme Court...."

The history of the clause clearly indicates that its language was a compromise between those who wanted appointment by the president alone and those who favored appointment by the Congress or Senate without a presidential role. The original Virginia Plan, introduced at the convention on May 29, 1787, provided that all judges would be appointed by the national legislature.[23/] By June 13, the convention had decided that appointment by the whole legislature was unwieldy, and had therefore adopted Madison's proposal that the appointment power be lodged in the Senate alone.[24/]

Two attempts to switch the appointment power to the president were defeated. On July 18, 1787, the convention voted down a proposal that the president appoint without congressional

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23/ Id. at 30; see generally Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 660-62 (1970).

24/ 4 The Founders' Constitution, supra, at 31.

approval, and on July 21, the convention rejected a motion that the President appoint unless "disagreed to by the Senate."[25/] Only near the end of the convention, on September 7, did the Framers agree to give the president any role in the selection of judges. The president's power to nominate, however, was carefully balanced by the requirement that the Senate advise and consent on every appointment.[26/]

Eight years later, in 1795, the Senate rejected Washington's nomination of South Carolina's John Rutledge to the Supreme Court. John Rutledge had been one of George Washington's original appointments to the Court, as well as one of the principal authors of the first draft of the Constitution. He had resigned from the Court to become Chief Justice of South Carolina. The Senate rejected his second nomination in 1795 by a vote of 14 to 10 because Rutledge had attacked the recently ratified Jay Treaty and was regarded as a weak Federalist.[27/] For those who find the "original intent" of the Framers persuasive, it is significant that three of the rejecting Senators had signed the Constitution.[28/]

25/ Id. at 32-33.

26/ Id. at 36. This formulation — nomination by the President, and appointment with the advice and consent of the Senate — was apparently patterned after the "experience of 140 years in Massachusetts." Id. at 32.

27/ Tribe, God Save This Honorable Court, 79-80 (1985).

28/ Schwartz, The Senate's Right to Reject Nominees, The New York Times, at A27, col. 2 (July 3, 1987).

B. How The Senate Has Exercised Its Role

Over 200 years, the Senate has rejected almost 20 per cent of the president's Supreme Court nominees.29/ Beginning with John Rutledge in 1795, the Senate has considered and rejected nominees because of their views on a range of issues, including federal supremacy, civil service, slavery, immigrants, unions, business, and civil rights. Sometimes the Senate has rejected a candidate outright; other times, the Senate has declined to take action or a candidate has withdrawn.30/

In this century, the Senate rejected President Hoover's 1930 nomination of Chief Justice John Parker of North Carolina, by a vote of 41-39, largely due to Parker's racist campaign speeches and anti-union attitudes. The Senate also rejected President Nixon's nomination of Clement Haynsworth and Harold Carswell. Carswell's rejection was based in part on 1948 campaign speeches supporting white supremacy.

29/ Id. Until 1900, the Senate rejected more than one out of four presidential nominees; since 1900, only one out of every 13 nominees has been rejected.

30/ The rejected nominees include: John Crittenden, John Quincy Adams' nominee, whose nomination in 1829 was never voted on because of his strong Whig leanings; George Woodward, who was rejected in 1845 by a vote of 29-20 due to his anti-immigrant views; Secretary of State Jeremiah Black, James Buchanan's nominee, whose opposition to the abolition of slavery led to his 26-25 rejection; and Caleb Cushing, Ulysses S. Grant's nominee, who withdrew after discovery of his war-time correspondence with Confederate President Jefferson Davis. Tribe, God Save This Honorable Court, supra, at 86-89. The Senate was particularly strong for approximately two decades after 1837, and ten of the 18 nominations made by the presidents serving between Jackson and Lincoln failed to win Senate confirmation. For example, in 1844, when Justice Baldwin died, two presidents sent a total of five nominations to the Senate before his seat was finally filled, two and one-half years later. Id. at 58-59.

C. The Senate's Appropriate Role

As Professor Charles Black has written:

> The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution?[31/]

Those who believe it improper for Senators to reject nominees for ideological reasons would seldom restrict the President in the same fashion. Yet there is nothing in the text of the Appointments Clause or in its application during the past 200 years to suggest that the Senate should be more limited or less diligent than the president in the range of factors it may or should consider. "He who advises gives or withholds his advice on the basis of all the relevant considerations bearing on [the] decision."[32/]

While the President has broad discretion in most Executive appointments,[33/] the Senate's role in appointing Justices to the Supreme Court may more aptly be compared to its co-equal partnership in making treaties, or to the President's role in vetoing legislation. In each case, the structure and text of the Consti-

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31/ Black, A Note on Senatorial Consideration of Supreme Court Nominees, supra, at 660.

32/ Id. at 659 (emphasis added).

33/ Historically, the Senate has adopted a more deferential role in reviewing the President's Executive appointments; it has rejected a higher percentage of Supreme Court nominations than for any other national office. Tribe, God Save This Honorable Court, supra, at 78.

tution make plain that the governmental function is so important as to demand the concurrence of two branches.

Thus, constitutionally, the Senate has a shared role in the appointments process that obliges it to consider a broad range of factors, including a nominee's judicial philosophy.

III. CIVIL LIBERTIES RECORD

Judge Bork has been on the bench since 1982. During that time, he has written opinions involving key civil liberties issues: free speech, government secrecy, sexual discrimination, gay rights. He has not written opinions in many other areas such as church-state relations, race discrimination and its remedies, voting rights or reproductive freedom. However, his extra-judicial writings and speeches, including a series of unpublished speeches delivered mostly in the past five years, provide a clear expression of his views on these and other subjects.

A. Equal Protection and Voting Rights

Judge Bork's narrow view of the Equal Protection Clause is that it prohibits limited forms of discrimination against racial, ethnic or religious minorities, and very little else.[34/] According to Judge Bork, "[t]he equal protection clause ... can require formal procedural equality, and, because of its histori-

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[34/] Bork, Neutral Principles, supra, at 11. Judge Bork has not authored any equal protection cases while on the bench. He has, however, acknowledged in dictum that discrimination based on race, religion or ethnicity is constitutionally prohibited. See Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

cal origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause."35/

He does not believe that the Fourteenth Amendment bars judicial enforcement of racially restrictive covenants.36/ He does not believe that it limits state constitutions from precluding fair housing enforcement.37/ He does not believe that it was intended to provide heightened protection for illegitimate children.38/ He does not believe it entitles Congress to remedy de facto discrimination, even against racial minorities.39/

35/ Bork, Neutral Principles, supra, at 11. Judge Bork's approach to the constitutional provisions regarding private property — the Contract and Takings Clauses — is significantly different. While admitting that the "intention underlying" these clauses "has been a matter of dispute," he suggests that the clauses "have not been given their proper force" and can be utilized to limit state regulation of private property. Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 829 (1986). This expansionist view is reflected in his judicial decisions. E.g., Jersey Central Power and Light Co. v. Federal Energy Regulatory Comm., 768 F.2d 1500, 1506, vacated and remanded, 810 F.2d 1168 (D.C. Cir. 1987) (en banc) (striking down utility rate regulation); Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984) (striking down local zoning ordinance).

36/ Bork, Neutral Principles, supra, at 11. The Supreme Court ruled otherwise in Shelley v. Kraemer, 334 U.S. 1 (1948).

37/ Bork, Neutral Principles, supra, at 11. The Supreme Court ruled otherwise in Reitman v. Mulkey, 387 U.S. 369 (1967).

38/ Bork, Neutral Principles, supra, at 12. The Supreme Court has ruled otherwise. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

39/ Equal Educational Opportunities Act of 1972: Hearings on S.3395. Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 1343 (1972). The Supreme Court ruled otherwise in City of Rome v. United States, 446 U.S. 156 (1980).

The Supreme Court's longstanding view of the Fourteenth Amendment is far more expansive. Thus, the Court has repeatedly struck down discriminatory laws supported by nothing more than "a bare ... desire to harm a politically unpopular group...."[40] It has recognized the propriety of carefully crafted affirmative action plans.[41] And it has rejected the contention that the Equal Protection Clause can or should be limited to race.[42] These Supreme Court holdings are not, as Judge Bork would have it, far-out interpretations of the Court without basis in law. They are the result of the Court's attempt over decades to fulfill its role as the interpreter of broadly stated constitutional provisions. Judge Bork would eviscerate that role, and leave individual liberty primarily in the hands of majorities in state and local legislatures.

Moreover, Judge Bork sees little risk in reducing the Court's role in promoting equality:

> The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done well through it.[43]

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[40] U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[41] E.g., Johnson v. Transportation Agency, Santa Clara County, 55 U.S.L.W. 4379 (1987).

[42] E.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (sex discrimination). See also notes 38 and 40, supra.

[footnote cont'd]

Judge Bork also minimizes the role of Congress in promoting equality, preferring instead to defer to local majorities, which historically have been the major source of racially discriminatory laws and customs. Thus, in 1972, Judge Bork testified that federal legislation dealing with remedies for de facto segregation, "would raise ... grave issues of constitutional policy...."[44/] He stated:

> Th[e] difficulty with any interpretation that applies the strictures of the Fourteenth Amendment to de facto cases has led to attempts to say that Congress' power under the amendment is broader than that of the courts. Thus, it is suggested, the Court may not reach de facto situations but the Congress may. That solution leaves the legislative power where it belongs, in the Congress.... The solution seems improper, however, for it leaves the legislative power where it belongs only as between Congress and the Court, and shifts it impermissibly to Congress from the state legislatures. There is no warrant in the language or history of Section 5 to suppose that it is a national police power superior to that of the states. The power to "enforce" the Fourteenth Amendment is the power to provide and regulate remedies, not the power to define the scope of the amendment's command or to expand its reach indefinitely.[45/]

This view, which Judge Bork has not repudiated in any material available publicly, would resurrect the discredited doctrine of states' rights with respect to racial discrimination.

[43/] Bork, The Impossibility of Finding Welfare Rights in the Constitution, 3 Wash. U.L.Q. 695, 701 (1979).

[44/] Equal Educational Opportunities Act of 1972: Hearings on S. 3395 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, supra, at 1343.

[45/] Id.

Judge Bork also rejects Supreme Court doctrine that relies on the Fourteenth Amendment to ensure equality of the franchise, criticizing the one-person, one-vote cases as lacking any "constitutional ... excuse.[46] According to Judge Bork:

> The principle ... runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula [of one-person, one-vote].[47]

Based on his extremely restrictive view of the scope of the Fourteenth Amendment and the role of the Supreme Court in enforcing it, Judge Bork also disagrees with the Supreme Court's decision in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), invalidating Virginia's use of a poll tax in state elections.[48] He disagrees with the Supreme Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), upholding a congressional ban on English literacy tests for voters who had completed the sixth grade in a Puerto Rican school.[49] In short, Judge Bork repudiates key Supreme Court precedent in the voting rights area under the Fourteenth Amendment.

Consistent with his narrow views on the Fourteenth Amend-

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[46] Bork, The Supreme Court Needs a New Philosophy, Fortune 138, 163 (Dec. 1968).

[47] Bork, Neutral Principles, supra, at 18. Judge Bork suggests that the Guarantee Clause of the Constitution requires "rational" reapportionment to protect majority rule, but does not "easily translate[ ] into the one person, one vote requirement ...." Id. at 19.

[48] Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 5, 17 (1973) (statement of R. Bork).

[49] Id. at 16.

ment, Judge Bork has also been a critic of the Supreme Court's affirmative action decisions, describing Justice Powell's Bakke opinion[50] in the following terms: "As politics, the solution may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later."[51]

Judge Bork has even suggested that employment and education issues are too subjective for judicial review.

> Certain forms of discrimination present the problem of criteria that are real but cannot easily be established by evidence. It is easy enough to establish whether a person has been turned away from a restaurant because of race or sex -- the variables are few. But employment discrimination presents a different problem. The decision concerning who is to be hired or not hired, who is to be promoted or passed over, does not always, or perhaps even usually, turn upon objective and quantifiable data. Such decisions also rest upon elements of judgment and intuition. On a case-by-case basis, therefore, the employer's decision will usually turn out to be unreviewable. Unless he admits bias, it is almost impossible to prove that he discriminated.
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> We are beginning to see that there are areas in which a government of men rather than of laws is to be preferred.[52]

50/ Regents of the University of California v. Bakke, supra, 438 U.S. 265.

51/ Bork, The Unpersuasive Bakke Decision, supra, at 8, col. 5.

52/ Bork, We Suddenly Feel That Law Is Vulnerable, Fortune 115, 136 (Dec. 1971).

B. Sex Discrimination

Judge Bork has an even more restrictive view of the Fourteenth Amendment and the role of the Supreme Court with respect to sex discrimination.

This flows directly from Judge Bork's radical judicial philosophy. In 1984, Judge Bork wrote: "The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities."[53/] Women are conspicuously absent from this list. Judge Bork's view is that because women are not explicitly mentioned in the Fourteenth Amendment, the amendment offers them no distinct constitutional protection. While Judge Bork would not protect racial minorities from most state and local discrimination, he would not protect women under the Constitution from any discrimination, federal, state or local.

Judge Bork has also opposed passage of the Equal Rights Amendment, stating that "the role that men and women should play in society is a highly complex business, and it changes as our culture changes."[54/] This leads Judge Bork to conclude that judges should not be asked to decide "all of those enormously sensitive, highly political, highly cultural issues" that are inherent in determining the meaning of equality.[55/]

53/ Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.).

54/ McGuigan, Judge Bork Is A Friend Of The Constitution, 11 Conservative Digest 91, 95 (Oct. 1985). Judge Bork explained that these were views held ten years ago, and that, as a judge, he no longer feels free to comment on the Equal Rights Amendment.

55/ Id.

Even where Congress has legislated in favor of sexual equality, Judge Bork has declined to enforce statutory guarantees by adopting narrow rules of construction. Thus, in Vinson v. Taylor[56], Judge Bork suggested that Title VII of the 1964 Civil Rights Act may not protect women against on-the-job sexual harassment. His view was unanimously rejected by the Supreme Court in an opinion written by Chief Justice Rehnquist. "[W]ithout question," the Court held, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[57]

Judge Bork adopted a similarly narrow construction of the Occupational Safety and Health Act of 1970, which requires an employer to provide "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...."[58] Despite the statute's broad remedial goals, Judge Bork rejected a challenge to a company policy demanding that women of childbearing age be surgically sterilized as a condition of employment in certain plant departments.[59] Judge Bork held that relief could be granted only if "the words of the statute inescapably" require it.[60]

56/ 753 F.2d 141, reh'g denied, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting), aff'd, Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

57/ Meritor Savings Bank v. Vinson, supra, 106 S. Ct. at 2404 (emphasis added).

58/ 29 U.S.C. § 654(a)(i).

59/ Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (Bork, J.).
[footnote cont'd]

C. Church/State

Judge Bork has never been called upon to rule on the religion clauses of the First Amendment. But he has, in a series of recent unpublished speeches,[61] offered an interpretation of the religion clauses that is contrary to traditional legal thought and the weight of historical evidence.[62]

In Judge Bork's view:

> The religious clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions. The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance. Instead both have been interpreted to give them far greater breadth and severity.[63]

Far from regarding government support of religion as a violation of the Establishment Clause and a threat to religious freedom, Judge Bork sees danger in maintaining a wall of separa-

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[60] Id. at 448 (emphasis added).

[61] See Bork, Unpublished Speech, Brookings Institute, Washington, D.C. (Sept. 12, 1985) [hereinafter, Brookings Speech]; Unpublished Speech, "Comments on Professor Morawetz's Paper," Woodrow Wilson International Center for Scholars, [Princeton University] (June 13, 1985); Unpublished Speech, University of California, Berkeley, Cal. (Apr. 29, 1985) [hereinafter, Berkeley Speech]; Unpublished Speech, "Religion and the Law," John M. Olin Center for Inquiry Into the Theory & Practice of Democracy, Univ. of Chicago (Nov. 13, 1984) [hereinafter, "Religion and the Law."]

[62] See generally, Levy, The Establishment Clause: Religion and the First Amendment (1986); Swomley, Religious Liberty and the Secular State (1987).

[63] Brookings Speech, supra, at 1.

criticized the Supreme Court's decision in Aguilar v. Felton, 473 U.S. 402 (1985), striking down the use of public funds to pay teachers in religious schools.[70]

More broadly, Judge Bork supports government action that generally advances religion.[71] He therefore welcomes, "the reintroduction of some religion into the public schools and some greater religious symbols in our public life."[72] He dismisses the threat of entanglement by noting that "government is inevitably entangled with religion."[73]

Judge Bork would even limit the federal court's power to hear First Amendment claims that implicate religion. Well-settled doctrine allows an individual to sue to stop the expenditure of government funds for religious purposes. Judge Bork contends this doctrine is wrong and "bring[s] into court cases in which nobody could show a concrete harm."[74]

If adopted, Judge Bork's position on the establishment clause could return prayer to the schools, allow nondiscriminatory state aid to religious institutions, and use the powerful arm of the state to coerce personal morality in vast and varied ways.

69/ Id. at 6.

70/ Bork, Brookings Speech, supra, at 3.

71/ Id.

72/ Id. at 11.

73/ Id. at 3.

74/ Bork, "Religion and the Law," supra, at 3-4; accord Brookings Speech, supra, at 3-4.

tion between church and state, a wall which he believes has led to a dangerous "privatization of morality."64/

> There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them.65/

Whatever "political divisiveness" may be caused by the presence of religious "symbolism" in public celebrations, Judge Bork believes the "thoroughgoing exclusion of religion is ... an affront and ... the cause of great divisiveness."66/ Thus, Judge Bork criticizes well-settled Supreme Court establishment doctrine, calling it "rigidly secularist."67/

Judge Bork's articulated philosophy suggests that he would not permit the Supreme Court to overrule local laws that have an overtly religious purpose.68/ According to Judge Bork, "[t]he first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way."69/ On those grounds, he has

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64/ Brookings Speech, supra, at 6.

65/ Brookings Speech, supra, at 12; accord Bork, "Religion and the Law," supra, at 15-16.

66/ Bork, "Religion and the Law," supra, at 15-16; accord Brookings Speech, supra, at 11.

67/ Brookings Speech, supra, at 10. He specifically criticizes the current three-prong test for determining violations of the Establishment Clause, which provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-3 (1971), quoting Walz v. Tax Commission, 397 U.S. 664 (1970).

68/ Bork, "Religion and the Law," supra, at 5.

[footnote cont'd]

Judge Bork likewise criticizes the "breadth and severity"[75] of the Free Exercise Clause, as interpreted by the Supreme Court. Twenty years ago, the Court stated: "[I]t is too late in the day to doubt that the libert[y] of religion may be infringed by the denial of or placing of conditions upon a benefit or privilege."[76] Justice O'Connor confirmed that test last Term:

> Only an especially important governmental interest pursued by narrowly tailored means can justify enacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.[77]

The Court has thus struck down laws that condition government benefits on an individual's relinquishment of the right to free exercise.[78]

Judge Bork apparently rejects this doctrine. He has criticized the Supreme Court for having "require[d] government to make special allowances for activity motivated by religious belief of such scope that, if government had done the same thing, without a court order, it would have violated the Establishment Clause."[79] In short, he does not believe that the Free Exercise Clause bars indirect abridgements of religious freedom, no matter

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75/ Bork, "Religion and the Law," supra, at 2; accord Brookings Speech, supra, at 1.

76/ Sherbert v. Verner, supra, 374 U.S. at 404.

77/ Bowen v. Roy, 106 S. Ct. 2147, 2167 (1986) (O'Connor, J., concurring in part and dissenting in part).

78/ Hobbie v. Unemployment Appeals Comm. of Florida, 107 S. Ct. 1046 (1987); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, supra, 374 U.S. at 398 (1963).

79/ Berkeley Speech, supra, at 5.

w severe.

D. Freedom of Speech and Press

Judge Bork believes that the First Amendment protects only eech that relates to the political process mandated by the nstitution, e.g., voting and legislative action. He bases this ew on the structure of government established by the Constitu- on -- "a form of government that would be meaningless without eedom to discuss government and its policies."[80/]

At one point he wrote that the First Amendment protects only eech that is "explicitly political. There is no basis for dicial intervention to protect any other form of expression, be scientific, literary or ... pornographic."[81/] More recently, stated that the First Amendment protects speech that "is sential to running a republican form of government," including peech about moral issues, speech about moral values, religion d so forth, all of those things [that] feed into the way we vern ourselves."[82/]

In situations where Judge Bork sees the First Amendment as

Bork, Neutral Principles, at 31.

Id. at 20. See id. at 26 ("All other forms of speech [than 'explicitly predominantly political'] raise only issues of human gratification, and ir protection against legislative regulation involves the judge in making legitimate] decisions...."); id. at 27 ("[T]he protection of the first ndment must be cut off when it reaches the outer limits of political ech."); id. at 29 ("[c]onstitutionally, art and pornography are on a par h industry and smoke pollution.").

Unpaginated Transcript, Public Affairs Television, Inc., Moyers: In rch of the Constitution #107 Strictly Speaking (Attorney General Edwin se and Judge Robert Bork) (Airdate May 28, 1987).

applying, he is generally protective of speech.[83] Judge Bork has argued that political dialogue should be absolutely immune from libel claims. Going beyond current Supreme Court doctrine, Judge Bork's concurrence in Ollman v. Evans[84] urged absolute immunity for a newspaper report that a Marxist professor "had no status within the profession."[85] According to Judge Bork, the professor was "not simply a scholar," but rather "an active proponent ... of Marxist politics,"[86] and therefore had "to accept the banging and jostling of political debate, in ways that a private person need not...."[87] He wrote:

> Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is if the opinion and editorial pages of the public press were modeled on the Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable for all the participants.[86]

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[83] The principal exception to this speech-protective attitude is Judge Bork's willingness to permit even political speech to be suppressed in furtherance of an alleged foreign policy interest. See Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1976), cert. granted sub nom. Boos v. Barry, 107 S. Ct. 1282 (1987); Abourezk v. Reagan, 785 F.2d 1043, 1062 (D.C. Cir.) (Bork, J., dissenting), cert. granted, 107 S. Ct. 666 (1986).

[84] Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (Bork, J., concurring).

[85] Id. at 996.

[86] Id. at 1004.

[87] Id.

[footnote cont'd]

Judge Bork has similarly criticized those restrictions on campaign finance that were upheld by the Supreme Court in Buckley v. Valeo[89/] on the ground that they permit the "government [to] regulate ordinary political speech and thus influence the outcomes of democratic processes."[90/] And he ruled that a photomontage depicting President Reagan could not be banned from the District of Columbia subways, emphasizing that the poster "conveys a political message" and that the subway had transformed itself into a public forum.[91/]

Judge Bork's view that political debate should be unregulated by the government also leads him to reject the fairness doctrine.[92/] Contending that "fairness" can better be assured through competition than regulation, he has urged the Supreme Court to "revisit this area of the law and either eliminate the distinction between print and broadcast media ... or announce a constitutional distinction that is more usable than the present one."[93/]

88/ Id. at 993.

89/ 424 U.S. 1 (1976); see Bork, "The Individual, the State and the First Amendment," Unpublished Speech, Univ. of Michigan, 1977 or 1978.

90/ Id.

91/ Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) (Bork, J.).

92/ The fairness doctrine requires broadcasters to provide evenhanded coverage of controversial issues. Its constitutionality was upheld by the Supreme Court in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1967). However, in August of this year, the FCC declared the fairness doctrine unconstitutional on the theory that the factual premises of Red Lion were no longer valid. In re Syracuse Peace Council (Aug. 6, 1987).

93/ Telecommunication Research and Action Center v. FCC, 801 F.2d 501, 509 [footnote cont'd]

On the other hand, Judge Bork refused to protect the speech of political demonstrators who sought to picket outside foreign embassies in Washington, D.C. He contended that criticism of foreign governments whose embassies we host would produce "ill treatment of ambassadors to the United States ... [and] adversely affect the interest of the United States."[94/]

In addition, Judge Bork excludes from his definition of protected political speech any advocacy of violence or civil disobedience designed to achieve a change in the government. Judge Bork would forbid such advocacy even where it represents no "clear and present danger."[95/] He would, therefore, give no constitutional protection to the work of writers advocating civil disobedience, such as Thoreau, Gandhi or Martin Luther King, Jr. "Speech advocating ... the frustration of ... government through law violation has no value in a system whose basic premise is democratic rule," Judge Bork has asserted.[96/]

He thus disagrees with many of the leading free speech cases of the last half-century in which the Supreme Court has held that speech advocating the overthrow of government is constitutionally protected unless it is intended and likely to produce imminent, lawless action.[97/] According to Judge Bork:

(D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3821 (1987).

94/ Finzer v. Barry, 798 F.2d 1450, 1459 (D.C. Cir. 1986) (Bork, J.), cert. granted sub nom. Boos v. Barry, 107 S.Ct. 1282 (1987).

95/ Bork, "The Individual, the State and the First Amendment," supra.

96/ Bork, "The Individual, the State and the First Amendment," supra.

97/ E.g., Brandenburg v. Ohio, supra, 395 U.S. at 444.

> The tradition of support for civil disobedience and even violence is deeply disturbing, particularly disturbing because it is so firmly established in the institutions that mold opinions.[98]

The Supreme Court, by contrast, has firmly adopted the view articulated by Justice Brandeis in his famous concurrence in Whitney v. California,

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[99]

Judge Bork would permit any local community to bar speech it found offensive. At the time of the Skokie case, for example, he said that "the fundamental issue raised by Skokie ... is whether a creed of that sort ought to be allowed to find voice anywhere in America."[100] He found it "remarkable" that "the legal order" would assume "that Nazi ideology is constitutionally indistinguishable from republican belief."[101]

Furthermore, Judge Bork's view of the First Amendment as limited to "political" speech places the entire realm of artistic expression outside the protection of the First Amendment or, at

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98/ Bork, We Suddenly Feel That Law Is Vulnerable, supra, at 116.

99/ 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

100/ Bork, "The Individual, the State and the First Amendment," supra.

101/ Id.

best, "towards the outer edge."[102/] "It is sometimes said," Judge Bork has asserted, "that works of art ... are capable of influencing political attitudes. But ... [they] are not on that account immune from regulation."[103/] This radically restrictive view of the First Amendment, coupled with Judge Bork's deference to legislated morality, raises the possibility that books like Ulysses, or indeed the variety of books that have more recently been the subject of attempted censorship by local school boards, could once again be banned if deemed offensive to the public at large.

Although Judge Bork has an expansive view of the Supreme Court's role in protecting certain forms of expression under the First Amendment, Judge Bork is in fact far outside the broad range of traditional First Amendment jurisprudence. He would narrow the Supreme Court's protection of free expression primarily to political speech. Even within this category, he excludes speech that advocates civil disobedience or "offensive" political ideologies.

Thus, Judge Bork's approach to the First Amendment would diminish the Supreme Court's role in protecting freedom of expression from governmental trespass and once again allow local majorities to determine what is acceptable.

102/ Unpaginated Transcript, Public Affairs Television, Inc., Moyers: In Search of the Constitution, supra.

103/ Bork, "The Individual, the State and the First Amendment," supra.

E. Privacy

Judge Bork does not find a right to privacy in the Constitution. It is a right he says, that "strikes without warning" and lacks "intellectual structure."[104/]

> [T]he so-called right to privacy cases, which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases[,] ... share the common theme that morality is not usually the business of government but is instead primarily the concern of the individual.[105/]

Accordingly, Judge Bork rejects Supreme Court doctrine that has recognized, over the last half-century, a constitutional right to privacy in a wide variety of contexts,[106/] including: the purchase and use of contraceptives by married people,[107/] single individuals,[108/] and minors;[109/] the decision of a woman, in consultation with her physician, to determine whether to have an abortion;[110/] a parent's right to defend his or her relationship with a child, whether the parent is mother or father,

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104/ McGuigan, Judge Robert Bork Is A Friend of The Constitution, supra, at 97.

105/ Bork, Brookings Speech, supra, at 6.

106/ Bork, Neutral Principles, at 7. See also Unpaginated Transcript, Public Affairs Television, Inc., Moyers: In Search of the Constitution, supra.

107/ Griswold v. Connecticut, supra, 381 U.S. 479. The Court protected the activities of medical personnel distributing contraceptives, as well as activities in the privacy of the marital bedroom.

108/ Eisenstadt v. Baird, 405 U.S. 438 (1972), invalidated a Massachusetts law prohibiting distribution of contraceptives to single people.

109/ Carey v. Population Services International, 431 U.S. 678 (1977).

110/ Roe v. Wade, supra, 410 U.S. 113 (1973); Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986).

married or unmarried,[111] and, the individual's right to possess obscene material in the privacy of the home.[112]

As to Roe v. Wade, which upholds a woman's right to control reproduction, Judge Bork has testified: "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[113]

As a Court of Appeals judge, Judge Bork has refused to enforce claims of privacy that he is empowered to adjudicate, contending that a lower court should not enforce a right unless the Constitution, by its express terms, or a Supreme Court decision squarely on point, prevents the government from taking a challenged action.[114]

111/ Stanley v. Illinois, 405 U.S. 645 (1972); Santosky v. Kramer, 455 U.S. 745 (1982).

112/ Stanley v. Georgia, 394 U.S. 557 (1969).

113/ The Human Life Bill: Hearings on S.158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, supra, at 310. See Greenhouse, No Grass is Growing Under Judge Bork's Seat, N.Y. Times, at A18 (Aug. 4, 1987).

114/ Judge Bork refused to recognize a constitutional right to privacy when James L. Dronenburg challenged a government decision dismissing him from the Navy solely on grounds that he engaged in homosexual sex. Dronenburg v. Zech, 741 F.2d 1388, 1395 (D.C. Cir. 1984). In Dronenburg, Judge Bork speculated that the mere presence of homosexual men in the military causes damage:

> Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

[footnote cont'd]

Judge Bork's comments about privacy reveal a great deal about his judicial philosophy. Judge Bork grants the community broad power over the individual. The Supreme Court, by contrast, has repeatedly recognized what Justice Brandeis described as "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."115/ Within that zone of privacy, the individual is protected against unwarranted community intrusion.116/

Judge Bork denies the right to privacy because it is not explicitly mentioned in the Constitution. However, as Judge Bork has acknowledged in the libel context, "[a] judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."117/

Dronenburg v. Zech, supra, 741 F.2d at 1398.

Judge Bork's parade of horribles that can result from the presence of male homosexuals on the job stands in sharp contrast to his dismissive attitude toward the problem of male heterosexual harrassment of women. Vinson v. Taylor, supra.

Although the Supreme Court in Bowers v. Hardwick, 478 U.S. ____ (1986), subsequently upheld the constitutionality of state sodomy laws, it specifically did not duplicate Judge Bork's generalized rejection of a constitutional right to privacy.

115/ Olmstead v. United States, 277 U.S. 438, 378 (1928) (dissenting opinion).

116/ See Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) ("I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.") (emphasis in original).

117/ Ollman v. Evans, supra, 750 F.2d at 996.

F. Criminal Law

Judge Bork's record in the area of criminal law also reveals a disregard of Supreme Court precedent at the expense of fundamental rights.

It is well-settled, for example, that the Fourth Amendment provides people suspected of crime with a series of protections against unreasonable searches including the exclusion of evidence seized in violation of the procedures mandated by the Amendment. Judge Bork has suggested that the exclusionary rule be abandoned. "The only good argument [for the exclusionary rule] really rests on the deterrent rationale, and it's time we examine that with great care to see how much deterrence we are getting and at what cost."118/ He takes this position in the face of overwhelming evidence that the exclusionary rule has virtually no negative effect on law enforcement or crime rates and would not, if abolished, enhance public safety. Because Judge Bork opposes the exclusionary rule, however, he would impose a heavy burden on those who support it to show that its effects are socially beneficial.

In sharp contrast, Judge Bork endorses the death penalty without any effort to justify its deterrent effect, relying on the references in the Fifth and Fourteenth Amendments to "capital offenses" and the "deprivation of life." He does not believe that the Eighth Amendment, which bars "cruel and unusual punishment," provides any limitations on those clauses, disputing that

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118/ McGuigan, An Interview with Robert H. Bork, supra, at 6.

the standard of what is cruel and unusual should evolve over time.[119]/

In general, Judge Bork's approach to criminal appeals reflects little respect for the rights of the innocent who may be mistakenly accused, or for the role of the courts in protecting those rights.[120]/

In United States v. Mount, Judge Bork argued that the court's supervisory power could never be invoked to exclude evidence obtained by means which shock the conscience,[121]/ although the issue was not before the court (indeed the doctrine warranted only a footnote in the majority decision).[122]/ Judge Bork insisted that the Supreme Court had created a general bar against the use of supervisory power to suppress evidence, stating:

> [O]ur supervisory powers have been substantially curtailed by the Supreme Court's recent decision in United States v. Payner, 447 U.S. 727 (1980).[123]/

In fact, the Supreme Court had specifically disavowed the

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[119]/ Id. at 5-6.

[120]/ Similar limitations on access to courts are manifest in Judge Bork's opinions in related areas. See, e.g., McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983) (holding that Section 1983 action alleging police misconduct was barred by plaintiff's failure to comply with local six-month notice requirement); and, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (where majority held that McClam was erroneously decided and where Bork dissented, adhering to his reasoning in McClam, and taking a more restrictive view of the issue than did Justice Scalia, then a member of the Brown majority).

[121]/ United States v. Mount, 757 F.2d 1315, 1320 (D.C. Cir. 1985).

[122]/ Id. at 1318 n.5.

[123]/ Id. at 1320

construction which Judge Bork placed on its opinion, noting:

> [O]ur decision today does not limit the traditional scope of the supervisory power in any way.[124/]

Although criminal law is not an area in which civil liberties has fared well in the Supreme Court in recent years, Judge Bork would go much further than existing Supreme Court rulings to cut back on due process rights.

G. Access to the Courts

Judge Bork has consistently closed the courthouse door to individuals seeking relief for a broad range of constitutional and statutory violations.[125/] His radical restriction of federal

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124/ 447 U.S. at 735 n.8. In addition, Judge Bork insisted that the Supreme Court had announced a general rule that exclusion of evidence is never appropriate unless that remedy would have a deterrent effect on law enforcement practices, 757 F.2d at 1321, attributing to the Court the "holding" that "where the exclusionary rule 'does not result in appreciable deterrence,' its use is not warranted," citing United States v. Leon, 468 U.S. 897, (1984).

The cited language is not the holding of Leon. It is not even an accurate quotation. Rather, the language appears in a discussion of non-criminal proceedings (in which the exclusionary rule may be less likely to deter misconduct) and is a quotation from an earlier case in which the Court declined to extend the rule to civil proceedings:

> '[i]f ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation [federal civil proceedings] is unwarranted.'

468 U.S. at 909 [emphasis added], quoting United States v. Janis, 428 U.S. 433, 454 (1976).

125/ Bork has also urged Congress to cut back access to the federal courts. He has testified that:

> The only solution to the workload problem is a drastic pruning of jurisdiction of all Federal Courts.... So far as the Supreme Court is concerned, part of their [sic] difficulty is self-inflicted. The have, over a period of years, taken on types of cases which the Supreme

[footnote cont'd]

jurisdiction reflects the limited role he grants the federal courts to vindicate individual rights.

Words like "standing," "justiciability" and "immunity" may sound far-removed from civil liberties.[126/] But as Judge Bork has put it, "[i]n constitutional law philosophical shifts often occur through what appears to be mere tinkerings with technical doctrines."[127/] Whether a court denies a civil liberties claim on the merits or refuses to hear a civil liberties claim on jurisdictional grounds, the effect is the same: Civil liberties are denied.

Judge Bork enforces jurisdictional bars in an extreme manner that often places him in a position of dissent from his colleagues.[128/] In other cases, where his judicial colleagues

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Court previously did not do and invited a great deal of litigation that previously was not there.

Hearings on S.1847 Before the Subcomms. on Courts and Agency Admin. of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. at 9, 13-14 (1982).

126/ A basic principle of American constitutional law requires that federal courts adjudicate only live cases and controversies between parties who have a real stake in the outcome of the litigation. These requirements are central to our constitutional structure and serve many vital functions: They assure that cases will be decided in a context in which concrete facts can illuminate abstract principle and that the energy of federal judges will be devoted to cases that truly demand judicial resolution. Nevertheless, if requirements of justiciability are enforced with excessive rigor, individuals with legitimate grievances are denied not only their rights but also their day in court.

127/ Bork, "Religion and the Law," supra, at 2.

128/ For example, Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) (Bork, J., concurring), vacated, 107 S. Ct. 734 (1987), involved a challenge to President Reagan's pocket veto of a human rights certification bill. Bork dissented, on grounds that legislators lack standing. Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) upheld a prisoner's right to bring a damage action in federal court against prison officials for an alleged violation of his constitutional rights. Bork dissented, saying that the prisoner had not complied with state [footnote cont'd]

have held that a claim is not justiciable, Judge Bork has written separately to urge a broader rule to deny access for civil liberties claims to an even larger group of potential litigants.[129/] He gives little apparent weight to the need to enforce the Constitution against violations by the political branches of government or to the central importance of federal courts in enforcing civil liberties.

1. Restrictions on Standing to Sue in Federal Court

Standing is the determination of whether a particular person is the proper party to bring a matter to the court for adjudication. Judge Bork has explicitly stated that standing doctrine should limit "the number of occasions upon which courts will frame constitutional principles to govern the behavior of other branches and of states."[130/]

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procedural rules. Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986) (en banc) upheld the rights of Japanese-Americans to challenge government action confiscating their property during World War II. Bork dissented, asserting that the claims should have been filed at the time and are now barred by the statute of limitations. Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987) allowed Medicare beneficiaries to present a First Amendment challenge to restrictions on services in Christian Science nursing homes. Bork dissented, on grounds that the statute does not allow any challenge, even on constitutional grounds, where the claim is for less than $1,000.

129/ E.g., Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985) held that the government could close a homeless shelter if alternative housing were provided. Bork concurred, arguing that the court had no jurisdiction to hear the case. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) found no jurisdiction. Bork concurred, articulating broader grounds for denying relief. Telecommunications Research & Action Center v. Allnet Communications Servs. Inc., 806 F.2d 1093 (D.C. Cir. 1986) denied an organization standing to claim money damages for its members in the circumstances of the case. Bork concurred, advocating a per se rule barring any organization from suing for money damages for its members. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) denied Israeli plaintiffs access to federal courts to redress a tort allegedly committed in violation of the law of nations. Bork concurred, arguing that the 1789 statute creating federal jurisdiction over actions in these circumstances had virtually no modern role.

[footnote cont'd]

It is not simply that Judge Bork strictly adheres to existing limits on standing.[131] Rather, Judge Bork pushes the

[130] Barnes v. Kline, supra, 759 F.2d at 55.

[131] An example of his narrow reading of current law can be found in his limited view of the types of injuries that are sufficient for standing. The Supreme Court has held that plaintiffs must allege a personal injury to have standing. See, e.g., Gladstone, Realtors v. Village of Bellwood 441 U.S. 91, 100 (1979); Sierra Club v. Morton, 405 U.S. 727, 735 (1972). Judge Bork has rejected claims of injury in circumstances where current law would seem to allow standing. For example, in Northwest Airlines v. F.A.A., 795 F.2d 195 (D.C. Cir. 1986), an airline sued the Federal Aviation Administration to challenge a decision permitting a pilot who had been suspended for intoxication to fly commercial planes. The Airlines claimed that the threat to traffic safety gave it standing to sue. Although this injury is within the zone of interests protected by the Federal Aviation Act, Judge Bork found the injury "far too speculative and conjectural to provide a basis for standing." Id. at 202.

Similarly, in Citizens Coordinating Committee on Friendship Heights v. Washington Area Metropolitan Transit Authority, 765 F.2d 1169 (D.C. Cir. 1985), the court, in an opinion by Judge Bork, denied standing to a plaintiff alleging violations of the Clean Water Act by the Transit Authority's pollution of a stream. The Supreme Court has explicitly ruled that environmental and aesthetic injuries are sufficient for standing. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 402 U.S. 727 (1972). Nonetheless, Judge Bork's found the alleged noneconomic injury insufficient for standing.

Similarly, where an injury is "indirect," Judge Bork would deny standing to a party challenging government action lest the court become involved "in the continual supervision of more governmental activities than separation of powers concerns should permit." Haitian Refugee Center v. Gracey, 809 F.2d 794, 810 (D.C. Cir. 1987). In Gracey, a non-profit corporation that exists to help Haitian refugees sued to stop a federal government program designed to interdict undocumented aliens on the high seas. The plaintiff claimed, in part, that it would be injured in that it could not perform its counseling function because the government's program kept Haitians from contacting the Center.

The Supreme Court had allowed standing on an almost identical claim in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). Moreover, plaintiff alleged that the federal government's program was causing its inability to counsel and that a favorable court decision would allow it to resume counseling, which should have satisfied the requirement that plaintiff allege that the defendant's actions caused the harm and that a favorable court decision is likely to remedy the injury. See, e.g., Allen v. Wright, 468 U.S. 737 (1984). Nonetheless, Judge Bork found no standing because of "separation-of-powers principles central to the analysis of Article III." As Judge Edwards argued in dissent, Judge Bork's opinion ignored precedent and created a new limit on standing by ruling that the separation of powers concept leads a court to deny causation where it otherwise factually exists. Gracey, 809 F.2d at 826-27 (Edwards, J., dissenting).

law, in dissent and concurrence, beyond existing limits.

For example, Judge Bork has argued in dissent, that "[w]e ought to renounce outright the whole notion of congressional standing."[132/] Judge Bork acknowledges that no Supreme Court precedent supports his position. Nonetheless, he insists: "Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution."[133/]

Similarly, Judge Bork has argued that associations should not be permitted to sue for monetary damages on behalf of their members.[134/] The Supreme Court has expressly allowed associations -- for example, environmental and other public interest groups -- to sue on behalf of their members under specific circumstances.[135/] Judge Bork, by contrast, would "frame a per se rule against an association's standing...to assert damage claims on behalf of its members."[136/]

132/ Barnes v. Kline, supra, 759 F.2d at 41.

133/ Id. at 56.

134/ See Telecommunications Research & Action Center v. Allnet Communication Servs., supra, 806 F.2d at 1097.

135/ Hunt v. Washington State Apple Advisory Comm., 432 U.S. 333 (1977).

136/ Telecommunications Research & Action Center v. Allnet Communication Servs., supra, 806 F.2d at 1097.

2. Expansion of Sovereign Immunity Protection for the Government

A second way in which Judge Bork has attempted to limit access to the federal courts is by expanding the scope of sovereign immunity.137/ Sovereign immunity is a medieval doctrine that assumes the monarch can do no wrong. In its modern form, the Executive cannot be sued for illegal action unless consent has been given to suit. Thus, the doctrine protects the government from suit even if individuals have suffered a violation of their rights. Judge Bork has frequently argued to expand such immunity.138/

3. Narrow Construction of Jurisdictional Statutes

Judge Bork has also urged extremely narrow interpretations of statutes creating federal court jurfsdiction. Even where Congress has passed legislation requiring the federal courts to hear certain claims, Judge Bork has declined to find jurisdiction.139/

In restricting access to the court, Judge Bork firmly

137/ Judge Bork's expansive view of sovereign immunity takes the form of narrowly construing the provisions of the Federal Torts Claims Act, the primary statute where Congress has waived the United States' immunity. See, e.g., Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) (Bork, J.).

138/ For example, in Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), Judge Bork argued that the government had not waived sovereign immunity with respect to a First Amendment challenge to the administration of a thee federal Medicare program. See also Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc) (rejecting Judge Bork's dissenting view that a local ordinance barring damages claims by inmates also barred any claim seeking to vindicate constitutional rights).

139/ E.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774; (D.C. Cir. 1984) Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984). Both cases are discussed more fully in the section that follows on Executive Power.

rejects the remedial tradition which we have come to associate with the federal judiciary.

H. Executive Power

Judge Bork's judicial philosophy can be understood as an attack on the basic notion of checks and balances. One aspect of that philosophy is the extremely limited role he grants to the courts in mediating disputes between the individual and the government. Another aspect is his willingness to enlarge the power of the presidency at the expense of the legislatures, the judiciary and civil liberties.

As Solicitor General, Judge Bork argued that members of Congress lacked standing to challenge his firing of Archibald Cox. A federal court disagreed and also found the firing illegal.140/

Judge Bork has also expresssed views suggesting that the Independent Counsel Act141/ has serious constitutional defects. Testifying before Congress on bills that would have shifted control over appointment and removal of a Special Prosecutor from the president to Congress, Judge Bork stated: "To suppose that Congress can take that duty from the Executive and lodge it either in itself or in the courts is to suppose that Congress may b[y] mere legislation alter the fundamental distribution of powers dictated by the Constitution."142/

140/ Nader v. Block, 366 F. Supp. 104 (D.D.C. 1973).

141/ 28 U.S.C. §§ 591-8 (1978).

[footnote cont'd]

In an exchange with Senator Burdick, Judge Bork asserted that Congress must be satisfied with the President's "promise" not to remove the Special Prosecutor.

> Senator Burdick: This is one of the things that bother[s] me, Mr. Bork. The President, when Mr. Cox was dismissed, contended that he had the power to do so regardless of the contract. Is that not correct?
>
> Mr. Bork: The President said he had the power to do so regardless of the charter, yes.
>
> Senator Burdick: And any charter we make here, at this time, still does not change the powers of the President?
>
> Mr. Bork: No; it does not.
>
> Senator Burdick: In other words, regardless of what we do, the President has the inherent power to dismiss the Special Prosecutor?
>
> Mr. Bork: I admit the President has the legal power. I think he has made a promise to the American people.[143]

Judge Bork did indicate that if the Attorney General were to appoint the Special Prosecutor, without Senate confirmation, Congress might be able to impose conditions on removal. Under no circumstances, however, could Congress prevent the President from removing the Special Prosecutor.

Turning to the question of the President's authority to use military force without congressional approval, Judge Bork, in 1971, defended President Nixon's decision to bomb Cambodia,

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142/ Hearings on the Special Prosecutor before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 451 (1973).

143/ Nominations of William B. Saxbe to be Attorney General: Hearings Before the Sen. Comm. on the Judiciary, 93d Cong., 1st Sess. 92 (1973).

insisting that Congress had no power to limit the President's discretion to stage the attack:

> [T]here is no reason to doubt that President Nixon had ample constitutional authority to order the attack upon the sanctuaries in Cambodia.... That authority arises both from the inherent powers of the Presidency and from congressional authorization. The real question in this situation is whether Congress has the constitutional authority to limit the President's discretion with respect to this attack.[144/]

Contending that the Gulf of Tonkin Resolution amounted to a declaration of war against North Vietnam, Judge Bork argued that the President could claim a free hand to execute military and strategic "details", including the attack on a third country.

> I arrive, therefore, at the conclusion that President Nixon had full constitutional power to order the Cambodia incursion, and that Congress cannot, with constitutional propriety, undertake to control the details of the incursion. This conclusion in no way detracts from Congress' war powers, for the body retains control of the issue of war or peace. It can end our armed involvement in Southeast Asia and it can forbid entry into new wars to defend governments there.[145/]

Judge Bork has asserted exclusive Executive power in other contexts as well. Thus, Judge Bork testified that Congress has no power to require Executive intelligence agencies to obtain a

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144/ Bork, Comments on Legality of United States Action in Cambodia, 65 Am. J. Int'l. L., at 79 (1971) (emphasis added).

145/ During his confirmation hearings as Solicitor General, Bork responded to questions about how Congress could constitutionally act to end the war in Southeast Asia. Bork responded that he had "not studied the question of the particular form your efforts take ...," reciting the general principle that "the ultimate power of war and peace resides in the Congress." Nominations of Joseph T. Sneed to be Duputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, supra, at 9-10.

warrant before wiretapping an American citizen suspected of engaging in clandestine intelligence activities on behalf of a foreign country.[146]/

On the bench, Judge Bork would insulate the President from challenge in court by legislators. For example, Crockett v. Reagan involved a suit by 29 members of Congress challenging the legality of the President's maneuvers in El Salvador.[147]/ Judge Bork concurred separately, stating that legislator standing would violate the Constitution -- notwithstanding two prior panel decisions rejecting that view.

In Abourezk v. Reagan,[148]/ Judge Bork once more advocated deferring to the Executive at the expense of a congressional enactment that sought to protect civil liberties. Responding to the Executive's repeated exclusion from this country of aliens belonging to proscribed organizations, Congress passed the McGovern Amendment, which generally bars exclusion of an alien

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146/ Foreign Intelligence Surveillance Act: Hearings on H.R. 7308 Before the Subcomm. on Courts and Civil Liberties of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 130, at 134 (1978). Bork also argued that federal courts have no jurisdiction under Article III to issue warrants in this area, although they routinely do so in criminal matters. Moreover, Bork argued that judges should not even ensure that surveillance complies with constitutional standards. Id. According to Bork, abuse by intelligence agencies is not a realistic concern: "The possibility of future abuses has been greatly lessened because of [the] exposure [of past abuses]. We have established a new set of expectations, a new tradition, about how we want our intelligence agencies to behave." Id. at 132.

147/ The legislators claimed that the President had violated the War Powers Resolution, 50 U.S.C. §§ 1541-48 (1976), and the War Powers Clause of the Constitution by introducing military officials into situations "where imminent involvement in hostilities is clearly indicated by the circumstances." Crockett v. Reagan, 720 F.2d at 1355.

148/ 785 F.2d 1043, 1075 (D.C. Cir.) (Bork, J., dissenting) cert. granted, 107 S. Ct. 666 (1986).

based on political views or organizational affiliation. Abourezk concerned the denial of visas to four aliens, including the Nicaraguan Minister of the Interior and a former NATO general who had become an advocate of nuclear disarmament. The majority held that the visa denials appeared to circumvent the McGovern Amendment. Judge Bork dissented, stating that the majority opinion demonstrated "a lack of deference to the determinations of the Department of State ...."149/

Judge Bork's deference to the Executive, at the expense of Congress, is evident as well in his refusal to find federal jurisdiction over claims based on violations of international human rights, despite a statutory enactment providing for such jurisdiction. Plaintiffs in Tel-Oren v. Libyan Arab Republic 150/ were Israelis who alleged a violation of international law arising out of the deaths of children in an attack on a school bus by the Palestinian Liberation Organization. Judge Bork argued, in effect, that the 1789 federal statute upon which plaintiffs relied for jurisdiction created jurisdiction only over legal claims that existed in the eighteenth century.

Similarly, in Persinger v. Islamic Republic of Iran,151/ Judge Bork wrote a decision refusing to allow a former Iranian hostage to sue Iran in United States courts, despite a provision in the Foreign Sovereign Immunity Act permitting suits against

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149/ 785 F.2d at 1076.

150/ 726 F.2d 774 (D.C. Cir. 1984).

151/ 729 F.2d 835 (D.C. Cir. 1984).

foreign governments for injuries occurring within "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[152/] Plaintiff's injuries occurred within the American Embassy. Judge Bork concluded, however, that embassies were not sufficiently within the jurisdiction of the United States to trigger jurisdiction under the statute.[153/]

Finally, Judge Bork has relied on a cramped view of the statute of limitations to bar review of the Executive policy that placed Japanese-Americans in internment camps during World War II. The victims of that internment policy sought compensation for lost property in Hohri v. United States[154/]. Plaintiffs' claims turned on whether military necessity justified their internment. Had the claims been brought earlier, they would have been dismissed due to the Court's war-time deference to Congress and the Executive. Recently, however, Congress has disclosed documents establishing that military necessity had never existed. Judge Bork nevertheless found plaintiffs' claims to be time-barred.

Judge Bork's views on Executive power also lead him to shield Executive action from the checks-and-balances of public scrutiny.

Thus, Judge Bork has given a narrow reading to the Freedom of Information Act, a statute designed to promote democratic

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[152/] 28 U.S.C. § 1603(c).

[153/] 729 F.2d 839.

[154/] 793 F.2d 304 (D.C. Cir. 1986) (denial of rehearing en banc) (Bork, J., dissenting).

accountability by opening up government processes to review. Judge Bork frequently urges a restrictive interpretation of the statute, which prevents disclosure of information to reporters, research groups, and others.

For example, in McGehee v. C.I.A., 697 F.2d 1095 (D.C. Cir. 1983), Judge Bork argued against even in camera inspection of documents pertaining to the "People's Temple" in Guyana, which the C.I.A. had withheld from a journalist for more than two years. The majority wrote: "[W]here, as here, an agency's responses to a request for information have been tardy and grudging, courts should be sure they do not abdicate their own duty."155/ Judge Bork, by contrast, found no evidence of bad faith on the part of the agency, despite its dilatory and evasive behavior.

Second, Judge Bork would insulate the process of administrative deliberation by restricting access to information about the deliberative process and thereby often restrict effective lobbying. Indeed, he has stated that "[c]oncern about the effect of lobbying on agencies may itself" bar access to information.156/

155/ 697 F.2d at 114. See also Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986) (Bork, J.) (declining to order additional discovery against the F.B.I. based on a sampling of one percent of the pages withheld). Judge Bork also insulates corporate and commercial activity from public scrutiny. E.g., Greenberg v. Food and Drug Administration, 803 F.2d 1213 (D.C. Cir. 1986) (dissenting from denial of summary judgment to bar disclosure to publication group of list of health care facilities owning CAT scanner manufactured by particular company).

156/ Wolfe v. Department of Health and Human Services, 815 F.2d 1527, 1538 (D.C. Cir. 1987), reh'g en banc granted, ___ F.2d ___ (July 2, 1987) (Bork, J. dissenting). Faced with a request for disclosure of an agency log that [footnote cont'd]

Third, Judge Bork would enlarge the scope of Executive privilege, which he describes as "an attribute of the duties delegated to each of the branches by the Constitution."157/ He contends that to restrict the privilege "to the President himself" would be "troubling" because it "ignores the President's need, both long-established and all the more imperative in the modern administrative state, to delegate his duties."158/ Judge Bork's judicial colleagues criticized his effort "to extend the privilege ... to the entire Executive Branch, [and thereby] create an unnecessary sequestering of massive quantities of information from the public eye."159/

IV. CONCLUSION

This concludes our report on Judge Bork's record. We believe it fairly characterizes his views, and the judicial philosophy behind it, based on the entire body of his work to the extent it has been available to us.

On the basis of this record, we do not believe it is possible to locate Judge Bork within the broad range of accept-

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recorded the progress of topics considered for regulation, Judge Bork argued that the agency's deliberative process would be seriously harmed by disclosure. Judge Bork contended that the agency had a right to conduct its deliberations, prior to publication of a decision in the Federal Register, free and clear of public scrutiny and without being lobbied by interest groups.

157/ Id. For a full discussion of Executive privilege, see R. Berger, Executive Privilege (1975); Dorsen & Shattuck, Executive Privilege, Congress and the Courts, 34 Ohio St. L.J. 1 (1974).

158/ Id. at 1539.

159/ Id. at 1533.

able judicial thought consistent with a commitment to liberty and democracy, and the institutions designed to protect and assure both. Nor do we think it possible to locate Judge Bork within the conservative judicial tradition exemplified by Justices Felix Frankfurter, John Harlan or, lately, Justice Lewis Powell.

Judge Bork may well have strong intellectual credentials, but that is not enough. The Senate has a constitutional responsibility to scrutinize a nominee's judicial philosophy and determine whether it is consistent with the function of the Supreme Court in protecting individual rights. Judged by that standard, Robert Bork's nomination as Associate Justice of the Supreme Court should be rejected.

Attachment B

THE ESSENTIAL JUDGE BORK

A
REPORT ON THE TESTIMONY
OF JUDGE ROBERT H. BORK
BEFORE THE SENATE JUDICIARY COMMITTEE

AND
AN ANALYSIS OF HIS
CONSTITUTIONAL DOCTRINE

OCTOBER 2, 1987

PREPARED BY THE

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Introduction

This report by the staff of the American Civil Liberties Union reviews the testimony of Judge Robert H. Bork before the Senate Judiciary Committee in connection with his nomination to be an Associate Justice of the United States Supreme Court. The report analyses Judge Bork's testimony in six critical areas: race discrimination, sex discrimination, privacy, First Amendment rights, executive power, and judicial precedent.

In each area, the report compares Judge Bork's testimony with his judicial philosophy which he has articulated in opinions on the D.C. Circuit Court of Appeals, but particularly in voluminous unpublished speeches, academic writings, popular articles, and interviews spanning 35 years with an emphasis on his most recent philosophical statements. Judge Bork's judicial philosophy of "original intent" which he has consistently adhered to over this period can only be characterized as an extreme judicial philosophy which places him outside the mainstream of conservative judicial thinking.

Turning the Clock Back on Race Discrimination

Judge Bork urged the Senate to conclude that his "record ... shows a full sensitivity toward minorities ... [and] a consistent record favoring the interests of minorities. ..."[1] To the contrary, Judge Bork's testimony reveals a far more crabbed approach

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[1]Sept. 19, 1987, Afternoon Session at 38-1.

to race discrimination and its remedies than even previously articulated in his articles, speeches and interviews.

Judge Bork still believes that the Fourteenth Amendment does not bar judicial enforcement of racially restrictive covenants.[2] Judge Bork still believes that the Fourteenth Amendment does not guarantee the principle of one-person, one vote.[3] Judge Bork still believes that the Fourteenth Amendment does not prohibit a state poll tax that effectively disenfranchises racial minorities.[4] Judge Bork still believes that the Fourteenth Amendment does not empower Congress to remedy de facto racial discrimination.[5]

Most startling, Judge Bork testified that he would review an individual's claim of racial discrimination on the basis of mere reasonableness. He will not apply Supreme Court doctrine requiring strict or heightened scrutiny in cases of race

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[2]Sept. 15, 1987, Afternoon Session at 9-1 - 10-1, 42-2; see Shelley v. Kraemer, 334 U.S. 1 (1948).

[3]Sept. 15, 1987, Afternoon Session at 37-1; see Reynolds v. Sims, 377 U.S. 533 (1964).

[4]Sept. 15, 1987, Afternoon Session at 36-1; see also Sept. 18, 1987, Afternoon Session at 7-1 - 7-2; see Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[5]Sept. 17, 1987, Morning Session at 27-1, see Katzenbach v. Morgan, 384 U.S. 641 (1966).

discrimination.[6] A reasonableness standard, of course, allowed the Supreme Court to uphold the infamous doctrine of "separate-but-equal' in Plessy v. Ferguson,[7] which perpetrated racial segregation for the next three generations.

Judge Bork insisted that his "reasonable basis" test would yield "the same result[s] as strict scrutiny,"[8] stating that "it's just about absolutely unconstitutional to make a racial distinction."[9] Although Judge Bork characterized his reasonable basis test as simply a "different methodology,"[10] in practice the government would need to make only a minimal showing to sustain a racially invidious distinction. Under Judge Bork's test, the Court would be required to determine only whether "the differentiation made, [or] the disadvantage made [is] reasonable in light of a valid, government purpose."[11] But the Supreme court applies a strict scrutiny test to strike down those racial "differentiation[s]" for which the government can show no more than

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[6]Sept. 17, 1987, Afternoon Session at 12-2 - 12-3, 43-1 - 43-2, and 47-1; see also Sept. 18, 1987, Afternoon Session at 42-1.

[7]163 U.S. 537, 550-51 (1896).

[8]Sept. 18, 1987, Afternoon Session at 41-1.

[9]Sept. 16, 1987, Morning Session at 27-2.

[10]Sept. 17, 1987, Afternoon Session at 12-3.

[11]Sept. 17, 1987, Afternoon Session at 12-2 - 12-3.

"reasonable[ness] in light of a valid, government purpose." As the then Chief Justice Burger has put it:

> [Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling government interest and must be "necessary ... to the accomplishment" of their legitimate purpose.[12]

By contrast, Judge Bork's reasonable basis test is highly deferential to majoritarian preference and would once again leave questions of racial equality to the local legislature. Nevertheless, Judge Bork insisted, again and again, that a reasonableness test would provide racial minorities with adequate protection because "in race, almost no distinction I can think of is reasonable."[13] He later, however, testified that racial distinctions might be reasonable "in the most urgent circumstances. ..."[14]

Judge Bork's reasonable basis test in race discrimination cases is consistent with the exceedingly limited vision of the Fourteenth Amendment that he has long articulated:

> [t]he equal protection clause has two legitimate meanings. It can require formal procedural equality, and because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot

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[12] Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (citations omitted; emphasis added).

[13] Sept. 17, 1987, Afternoon Session at 13-2.

[14] Id. at 43-2.

properly be read into the clause.[15]

Indeed, at the hearings, Judge Bork continued to insist that he "was right" to criticize the Court's use of the Fourteenth Amendment to end discrimination in the electoral process,[16] and repeated that the poll tax invalidated by the Supreme Court in Harper v. Virginia Board of Elections[17] was racially non-discriminatory. Judge Bork's testimony simply ignores the racial animus behind the poll tax:

> I have no desire to bring poll taxes back into existence. I don't like them myself. But if that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just $1.50 poll tax. ... The poll tax was familiar in American history and nobody ever thought it was unconstitutional unless it was racially discriminatory.[18]

Judge Bork also stated that Shelley v. Kraemer,[19] a unanimous Supreme Court decision which banned state court enforcement of racially discriminatory restrictive covenants in

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[15]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 11.

[16]Sept. 15, 1987, Afternoon Session at 37-1; see Bork, The Supreme Court Needs a New Philosophy, Fortune 166 (Dec. 1968).

[17]383 U.S. 663 (1966).

[18]Sept. 15, 1987, Afternoon Session at 36-1.

[19]334 U.S. 1 (1948).

real estate contracts, has had no precedential value.[20] Just three years ago, however, Chief Justice Burger, writing for a unanimous court, cited Shelley for the proposition that "[t]he actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment."[21] By rejecting Shelley, Judge Bork would severely narrow the doctrine of state action and thereby constrict the Court's power to order remedies against a broad range of discriminatory activities.

Similarly, Judge Bork adhered to his extremely narrow view of congressional power under Section 5 of the Fourteenth Amendment. He repeated his criticism of Katzenbach v. Morgan,[22] in which the Supreme Court upheld Congress' power to ban an English literacy test for voters who had completed the sixth grade in a Puerto Rican school. The Court said:

> [O]ur task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.[23]

Under questioning, Judge Bork agreed with an extremely narrow reading of Katzenbach that would severely limit remedies

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[20] E.g., Sept. 15, 1987, Afternoon Session at 10-1.

[21] Palmore v. Sidoti, supra, 466 U.S. at 432 n.1.

[22] 384 U.S. 641 (1966).

[23] Id., at 649-50.

for racial discrimination:

> Sen. Hatch: That's where the Supreme Court upheld a congressional statute that redefined the words of the Constitution itself ...
>
> Judge Bork: [T]hat's exactly what happened, Senator.[24]

Finally, Judge Bork continues to see little risk in reducing the Court's role in promoting equality. Ten years ago, Judge Bork wrote:

> The premise that the poor or the blacks are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done very well through it. In addition to its other defects, then, the welfare-rights theory rests less on demonstrated fact than on a liberal shibboleth.[25]

Judge Bork's testimony on affirmative action echoes that view. On the opening day of the hearings, Judge Bork testified that he

> certainly wouldn't have minded preferential treatment by private institutions for a period of time, until ... racial minorities [have been brought] into the American mainstream. It did begin to worry me, however, if those preferences became permanent.[26]

He added that:

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[24]Sept. 17, 1987, Morning Session at 25-2.

[25]Bork, The Impossibility of Finding Welfare Rights in the Constitution, 979 Wash U.L.Q. 695, 701.

[26]Sept. 15, 1987, Afternoon Session at 26-2.

> I was quite worried about the use of race . . . a long time. ... I used to think that ... if there was a transition period as we brought a certain racial group into the mainstream of American life, using race as a criterion might be all right. But what I was afraid of as a policy matter, was that the preferences would never go away, and it would become a permanent feature of American life, causing a lot of resentments, and causing other groups to demand the same preference.[27]

Although Judge Bork testified that his "policy views [of affirmative action] do not determine [his] statutory or constitutional views,"[28] he nowhere accepted the constitutionality of affirmative action programs.

Far from moderating his views on equality, Judge Bork espoused a profoundly disturbing interpretation of the Fourteenth Amendment. In the area of race, Judge Bork's rejection of strict scrutiny in favor of the more relaxed reasonable basis test belies his assertion that his record "shows a full sensitivity toward minorities."[29]

Sex Discrimination: Any Reasonable Basis Will Do

Judge Bork has long maintained that "[c]ases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the ... equal

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[27]Sept. 16, 1987, Morning Session at 33-1.

[28]Id. at 33-2.

[29]Sept. 19, 1987, Afternoon Session at 38-1.

protection clause."[30] He has consistently criticized and even belittled application of the Fourteenth Amendment to protect women against discrimination. As recently as June 1987, Judge Bork stated: "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."[31] Judge Bork condemned extension of the equality principle as merely the result of "fads in sentimentality."[32]

At the hearings, Judge Bork suddenly acknowledged that "every person is covered by the Equal Protection Clause."[33] He insisted that he would apply the Fourteenth Amendment to bar sex discrimination except in the "extreme" case.[34]

> The historical meaning, the core idea that ... caused the 14th Amendment to be adopted was the fear of and the reality of racial discrimination against former slaves in this country. ... [But the Amendment] after all, says, "Nor shall any state deny to any person the equal protection of the laws." If any person is covered, that means everybody is covered---men, women, everybody. And the question when a statu[t]e makes a distinction is whether the state has an adequate interest

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[30]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L. J. at 17.

[31]Bork, Interview with Worldnet, United States Information Service at 12.

[32]Bork, Unpublished Speech, Catholic University 1, 19 (1982).

[33]Sept. 17, 1987, Morning Session at 10-2.

[34]Id. at 10-1.

in it and the distinction is reasonable.[35]

Nevertheless, although Judge Bork stated on September 17 that women are protected by the Equal Protection Clause, the next day he said, "Women would not be covered if you ... [limited the application of the clause to] discrete and insular minorities."[36]

Judge Bork's new-found discovery that the Constitution has a place for women appears to be yet another example of "confirmation conversion." In any event, Judge Bork says he would apply only a highly deferential standard in assessing claims of sex discrimination. Again rejecting a heightened or strict scrutiny standard in favor of mere rationality, Judge Bork's offer of constitutional protection must be viewed as more illusory than real.

Judge Bork suggests that in sex discrimination cases, the "reasonable basis" test would

> reject artificial distinctions and discriminations ... [and] arrive at all ... or, virtually all of the same results ... that a majority of the Supreme Court has arrived at using a group approach and an intermediate level of scrutiny approach.[37]

He defends the requirement of mere rationality as

> not a weak protection in areas of race, gender, and so forth. ... [T]he reasonable basis test would give us all of the protections, maybe more, than you'd get by

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[35]Sept. 16, 1987, Morning Session at 28-1.

[36]Sept. 18, 1987, Afternoon Session at 40-2.

[37]Sept. 17, 1987, Morning Session at 10-2.

> identifying particular groups and deciding which level of scrutiny [applies]."[38]

Judge Bork ignores that his reasonable basis test would elevate to constitutional status the stereotypic prejudices of local majorities that for too long have posed barriers to social and political equality for women. Moreover, this view overlooks the fundamental principle incorporated in the equal protection clause, that legal rights should not be conditioned on immutable characteristics such as race or sex, and instead makes the enjoyment of full equality under law subject to transitory social notions of "reasonableness" and propriety. As Justice O'Connor observed in her opinion for the Court in Mississippi University for Women v. Hogan:[39]

> History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function.

Judge Bork defended his reasonable basis test:

> [A]s the culture changed and as the position of women in society changes, those distinctions ... now seem outmoded stereotypes and they seem unreasonable and they get struck down and that is the way a reasonable basis test should be applied."[40]

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[38] Id. at 11-1.

[39] 458 U.S. 718, n. 10 (1982).

[40] Sept. 15, 1987, Afternoon Session at 40-2.

> Most of the [gender-based] distinctions that have survived in the law are old ones, made long ago, which no longer seems reasonable to us. They aren't reasonable. In a different state of culture, in a different state of society, they may have seemed reasonable. They're not now.[41]

Insisting that gender-based legal distinctions "are beginning to fall ... because the place of women in society has evolved ... and changed,"[42] Judge Bork's testimony simply ignores the fact that judicial intervention has historically preceded -- and certainly facilitated -- the changing "place of women in society."

Judge Bork has stated that "the role that men and women should play in society is a highly complex business, and it changes as our culture changes." He concluded that judges should not be asked to decide "all of those enormously sensitive, highly cultural issues"[43] that are inherent in the meaning of gender equality. Judge Bork would thus subjugate women's fundamental constitutional rights under the Equal Protection Clause to changing "fads in sentimentality," subject to majoritarian whim, rather than articulate a principle which transcends temporal events. He would have us forget that, at the time the Fourteenth Amendment was adopted, the majority supported segregation of the races as necessary and "reasonable," a view that eroded in large

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[41]Sept. 17, 1987, Morning Session at 13-1.

[42]Id. at 12-2 (emphasis added).

[43]McGuigan, Judge Bork is a Friend of the Constitution, supra, 11 Conservative Digest at 95.

part because of its ultimate inconsistency with a principled and fundamental right to equality. Contrary to Judge Bork's assertion, the equality principle is never "trivial" to the victims of sex discrimination, even when it involves a case such as Craig v. Boren[44], which struck down gender-based drinking laws, any more than the same law, if race-based, would be trivial to its victims.

Just as Judge Bork's testimony reflects insensitivity to women's constitutional rights, several of his judicial opinions show a comparable insensitivity to women's statutory rights. In OCAW v. American Cyanamid Co.,[45] Judge Bork ruled that the Occupational Safety and Health Act did not prohibit American Cyanamid from requiring women workers to be sterilized to protect against fetal injury from exposure to lead. As a result of the company's "fetal protection policy," five women were forced to submit to sterilization or lose their jobs. In his testimony, Judge Bork stood by his opinion; he even went so far as to read relevant portions of it to the Committee.[46]

Judge Bork's opinion contains misstatements of fact, several of which were repeated in his testimony. First, Judge Bork insisted that the lead level in areas of the plant "could not be

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[44]429 U.S. 190 (1976).

[45]741 F.2d 444 (D.C. Cir. 1984).

[46]Sept. 19, 1987, Afternoon Session at 32-1 - 33-1.

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further reduced."[47] In fact, as Senator Metzenbaum noted,[48] an Administrative Law Judge had found that "technically feasible engineering controls" were available to reduce exposure.[49] Moreover, Judge Bork assumed that the risks from exposure were limited to fetuses.[50] In fact, OSHA found that lead "has profoundly adverse effects on the course of reproduction in males and females,"[51] yet males were not subjected to mandatory sterilization as a condition of employment. Finally, Judge Bork asserted that the company could have simply discharged the women and should not be held liable under the Act for offering them the choice of keeping their jobs.[52] In fact, it is inconceivable that Congress intended to allow employers to escape their responsibilities under the Act to provide "safe and healthful working conditions" for "every working man and woman" by firing a

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[47]Sept. 18, 1987, Afternoon Session at 18-2 - 19-1; see also Sept. 19, 1987, Afternoon Session at 32-1.

[48]Sept. 18, 1987, Afternoon Session at 18-2.

[49]Secretary v. American Cyanamid Co., OSHRC Docket No. 79-2438 (July 31, 1980), at 21.

[50]Sept. 19, 1987, Afternoon Session at 32-1.

[51]Attachments to Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 54421 (1978) (emphasis added).

[52]Sept. 19, 1987, Afternoon Session at 33-1; see also id. at 32-1; Sept. 18, 1987, Morning Session at 30-2.

major segment of the workforce -- fertile women.[53]

Vinson v. Taylor,[54] a case involving a claim of sexual harassment, further demonstrates Judge Bork's insensitivity to the facts that give rise to gender discrimination and his willingness to construe a statute to reach a result which upholds discriminatory treatment. In his opinion, Judge Bork referred to incidents of unwelcome harassment as "sexual dalliance" and "sexual escapades."[55] Judge Bork questioned whether sexual harassment is even covered by Title VII:

> Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as "discrimination." Harassment is reprehensible, but title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove.[56]

The Supreme Court unanimously rejected this cramped view of Title VII. Now Chief Justice Rehnquist wrote:

> Without question, when a supervisor sexually harasses a subordinate because of the sub-

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[53] 29 U.S.C. § 651(b) (emphasis added). Senator Metzenbaum observed: "And you can't tell me, Judge, that any member of Congress said or thought that a safer workplace could be achieved at the expense of forced sterilization. Congress said no hazards in the workplace, but you wrote an opinion, which said it's okay for a company to achieve safety at the expense of women ..." Sept. 18, 1987, Morning Session at 22-1.

[54] 753 F.2d 141, reh'g denied, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting), aff'd and remanded sub nom. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

[55] 760 F.2d at 1330, 1332.

[56] Id. at 1333 n.7.

ordinate's sex, that supervisor "discriminate[s]" on the basis of sex.[57]

Judge Bork assured the Committee that "there is no ground in my record anywhere to suspect that I would not protect women as fully as men."[58] The record simply does not support this claim.

There is No Right of Privacy

Judge Bork has consistently maintained that he does not find a right to privacy in the Constitution. He has said that the right to privacy "strikes without warning" and lacks "intellectual structure."[59] He has repeatedly criticized Supreme Court decisions -- most notably Griswold v. Connecticut[60] and Roe v. Wade[61] -- which recognize that the liberty principle of the Fourteenth Amendment protects individual "freedom of personal choice in matters of marriage and family life."[62]

During his testimony, Judge Bork did not modify these radical views to any significant extent. To the contrary, he reiter-

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[57] 106 S.Ct. at 2404.

[58] Sept. 16, 1987, Morning Session at 31-1.

[59] McGuigan, Judge Robert Bork Is a Friend of the Constitution, supra, 11 Conservative Digest at 97.

[60] 381 U.S. 479 (1965)

[61] 410 U.S. 113 (1973)

[62] Id. at 169 (Stewart, J., concurring).

ated his prior criticism of the Supreme Court's decisions in this area:

> * * * Griswold against Connecticut, which established or adopted a privacy right on reasoning which was utterly inadequate and failed to define the right so we know what it applies to. Roe against Wade ... contains almost no legal reasoning.[63]
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> Suppose a senator introduced a bill that said every man, woman and child in this country has a right of privacy. Period. ... Now the Supreme Court, or Justice Douglas, in effect did the same thing with the Constitution. Nobody knows what the thing means.[64]
>
> [I]f I was sitting on the Court and Justice Douglas circulated that essay about emanations and penumbras resulting in a generalized right of privacy. ... No, I would not have agreed to that opinion.[65]

Judge Bork's objections to the right to privacy are the same as before: the right is "unstructured,"[66] "undefined,"[67] "free-floating,"[68] a right which "can strike at random,"[69] which "comes

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[63]Sept. 15, 1987, Afternoon Session at 46-1.

[64]Sept. 16, 1987, Morning Session at 18-2.

[65]Sept. 18, 1987, Afternoon Session at 46-1.

[66]Sept. 15, 1987, Afternoon Session at 11-2.

[67]E.g., Ibid; id. at 31-2; Sept. 18, 1987, Afternoon Session at 46-1.

[68]E.g., Sept. 15, 1987, Afternoon Session at 12-1; Sept. 16, 1987, Afternoon Session at 20-2.

out of nowhere, [and] doesn't have any rooting in the Constitution."[70] Judge Bork asserted that a general right to privacy "is not in the Bill of Rights."[71] Therefore, according to Judge Bork's originalist philosophy, a judge cannot "tell the American people they may not have a law that in no way conflicts with the written and historical constitution."[72]

At the hearings, Judge Bork attempted, however, to recast his categorical rejection of the right to privacy as an objection only to the reasoning used by the Court in Griswold:

> I was objecting to the way, Justice Douglas in that opinion, Griswold against Connecticut, derived this right. It may be possible to derive an objection to [an] anti-contraceptive statute in some other way, I don't know.[73]

Similarly, when asked if there is a general right to privacy in the Constitution, Judge Bork replied: "Not one derived in that fashion, there may be other arguments, and I don't want to pass upon those, but --."[74]

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[69]Sept. 15, 1987, Afternoon Session at 56-1.

[70]Id. at 13-1.

[71]Id. at 31-2.

[72]Id. at 32-1.

[73]Id. at 11-1.

[74]Id. at 12-2.

Judge Bork's suggestion that there might be some way of reaching the result in Griswold and that he was only taking issue with the reasoning is inconsistent with views expressed prior to the hearings. For example, Judge Bork has written:

> The truth is that the Court could not reach its result in Griswold through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups.[75]

In a 1982 speech, Judge Bork also stated that "[t]he result [in Griswold and Roe] could not have been reached by interpretation of the Constitution."[76] Moreover, when Judge Bork criticized a particular case but believed the result could be reached on constitutional grounds, he has said so.[77]

Judge Bork did not, however, identify any rationale for Griswold or Roe that he would actually accept. In particular, Judge Bork rejected the Ninth Amendment as a textual basis for the right to privacy. Comparing the Ninth Amendment to an "ink blot" on the Constitution, Judge Bork testified, "I don't think you can use the Ninth Amendment unless you know something of what

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[75]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 9.

[76]Bork, Unpublished Speech, Catholic University, Washington, D.C. (March 31, 1982), at 4.

[77]See, e.g., Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 11 (noting that perhaps the result in Pierce v. Society of Sisters, 268 U.S. 510 (1925), "could be reached on acceptable grounds").

it means."[78] He added, "There is no evidence that I know of that ... that under the Ninth Amendment, the court was free to make up more bills of rights."[79]

When pressed, Judge Bork suggested that the equal protection clause might support a constitutional right to abortion, or rather that such an argument might not be "doctrinally absolutely impossible,"[80] because "only women have this specific burden and forcing a woman to carry a baby to term may be ... a form of gender discrimination."[81] However, Judge Bork indicated elsewhere in his testimony that gender distinctions on the basis of physical characteristics would probably be upheld as "reasonable."[82]

While Judge Bork promised that he would not overturn certain well-established precedents which he considers wrong as a matter of "original intent," he provided no assurances that he would not vote to overrule decisions in the privacy area, including Roe v.

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[78]Sept. 16, 1987, Morning Session at 22-1.

[79]Id. at 24-1.

[80]Sept. 16, 1987, Afternoon Session at 22-1.

[81]Id., at 21-1.

[82]See, e.g., Sept. 17, 1987, Morning Session at 13-1. Indeed, under current equal protection analysis, the Court has declined to hold that classifications on the basis of pregnancy are sex discrimination. See Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnancy from a disability benefits plan was not considered gender-based discrimination.)

Wade. Asked if it was "[t]oo late to tear up the doctrine of privacy," Judge Bork stated:

> some things are absolutely settled in the law, and I told you what they are. I've told you the incorporation doctrine is. I've told you the commerce clause is and so forth. These are things of -- not only of long standing, but all kinds of things have grown up around them. Any judge understands that you don't tear those things up.
>
> When you ask me a currently controversial issue, I cannot and I should not give you an answer.[83]

Judge Bork even described how he would approach the decision whether to overrule Roe v. Wade:

> If that case ... came up, and if the case called for a broad up or down [on abortion,] I would first ask the lawyer who wants to support the right, can you derive a right to privacy ... in some principle[d] fashion from the Constitution so I know, not only where you got it, but what it covers?
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> * * * If ... that didn't sound like [there] was going to be a viable theory, I would say to him, I would like you to argue whether this is the kind of case that should not be overruled.[84]

He indicated that he would weigh the following factors against preserving precedent:

> if [the decision is] wrong and ... whether it is -- it is a dynamic force, so that it continued to produce wrong and unfortunate

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[83]Sept. 17, 1987, Afternoon Session at 44-2 - 45-1; see also Sept. 16, 1987, Afternoon Session at 22-1.

[84]Sept. 15, 1987, Afternoon Session at 46-1.

decisions.[85]

Judge Bork also sought to defend his opposition to Griswold by misrepresenting the historical record. Again and again, Judge Bork insisted that there was no live issue because "the law in Connecticut was never used" and "no state has ever tried to enforce such a law."[86] In fact, there was at least one prosecution of two doctors and a nurse for violating the Connecticut statute prohibiting use of contraceptives.[87] That prosecution had serious consequences: Nine clinics which had been providing contraceptive services were closed and did not reopen until the Griswold decision in 1965.[88]

Judge Bork's reliance on nonenforcement also ignored the fact that existence of a criminal penalty for using contraceptives will have a "chilling effect" on an individual's willingness to use contraceptives and on health professionals' willingness to counsel patients to break the law.

Thus, it is clear that Judge Bork's views on privacy have not undergone any "confirmation conversion." Throughout his testimony, Judge Bork reaffirmed his rejection of Griswold and

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[85]Sept. 16, 1987, Afternoon Session at 22-2 - 23-1.

[86]Sept. 17, 1987, Morning Session at 6-1.

[87]Sept. 18, 1987, Afternoon Session at 46-2 - 47-1, citing State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

[88]Sept. 18, 1987, Afternoon Session at 47-1.

Roe and of the principle, common to both, that "the full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."[89] Liberty, however, is not merely an abstract principle. To reject the right of privacy is to deny women and men and ability to control deeply personal decisions affecting marriage, child-bearing and intimate relations.

In Search of First Amendment Rights

In articles, speeches, and interviews up to the time of his appearance before the Senate Judiciary Committee, Judge Bork has stated a view of the First Amendment which, by his own admission, could "strike a chill in the heart of civil libertarians."[90] Although his views have somewhat tempered over the years, as recently as 1983 they were described by one scholar as "extremist":[91]

> [C]ertainly no Justice of the Supreme Court has adopted anything close to Bork's theory

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[89] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal).

[90] Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L. J. at 20.

[91] Shiffrin, The First Amendment and Economic Regulation, 78 Northwestern L. Rev. 1212, 1235 (1983).

of freedom of speech.[92]

At the confirmation hearings, Judge Bork claimed to distance himself from his radical First Amendment philosophy. He stated:

> I have affirmed my full acceptance of the Supreme Court's first amendment jurisprudence, including the Brandenburg decision. ...[93]

Judge Bork's recantation echoes the "conversion" that he claimed to experience during the Senate's 1973 hearings on his nomination to be Solicitor General.[94] Then, as now, Judge Bork claimed to embrace the Supreme Court's First Amendment jurisprudence.[95] After he had secured confirmation, however,

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[92] Id. at 1234.

[93] Sept. 19, 1987, Afternoon Session at 38-1.

[94] In the current hearings, Judge Bork was asked:

Senator Leahy: "How far would you say you moved from the Indiana article in that 1973 period?"

Judge Bork: "About - about to where the Supreme Court currently is."

[95] Sept. 16, 1987, Afternoon Session at 2-2.

During the Senate's 1973 hearings, Bork likewise sought to distance himself from the First Amendment arguments set forth in Neutral Principles:

> I have to insist, I am afraid that when I wrote that article I was entering into a field for the first time, and ... trying out a theoretical concept if you will. I do not know what I will ultimately conclude in the [First Amendment] field.

Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 21 (1973).

Judge Bork continued to disagree with well-settled constitutional doctrine in this area.[96]

Notwithstanding Judge Bork's "conversion," his testimony reaffirms his continued rejection of Supreme Court doctrine and his adherence to a uniquely constricted view of the First Amendment. He continues to see the core of the amendment as political, and only grudgingly extends protection to literary and artistic speech. He maintains his criticisms of the Supreme Court's treatment of pornography, and does not embrace the Court's treatment of profanity. Although he claims to accept the Supreme

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[96]For example, in 1971 Bork had written:

> [T]he notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not think so.

Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 28.

But in 1979, eight years after his initial entry "into [the] field," Bork reaffirmed, without hesitation, positions set out in his 1971 article:

> I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it, will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law.

Bork, Unpublished Speech, "The Individual, the State and the First Amendment," supra, at 9. Bork proceeded to reassert his 1971 criticism of Supreme Court doctrine.

Court's decision in Brandenburg v. Ohio,[97] he continues to criticize its reasoning.

The Political Core

Over the years, Judge Bork has repeatedly stated that the First Amendment protects only speech that relates to the political processes mandated by the Constitution.[98] He continues to assert that: "[E]verybody accepts the fact that the First Amendment starts from a political core."[99]

Most legal scholars do not share his fundamental premise. Rather, they place emphasis on a core of individual freedom--the right to self-expression and self-fulfillment -- which Judge Bork finds nowhere in the First Amendment.[100]

Artistic Expression

Consistent with Judge Bork's view that the First Amendment primarily protects speech essential to the republic, Judge Bork

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[97]395 U.S. 444 (1969).

[98]See, e.g., Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 20; Bork, Unpublished Speech, "The Individual, the State and the First Amendment, supra, at 8.

[99]Sept 17, 1987, Afternoon Session at 31-1.

[100]Professor Thomas Emerson, for example, Judge Bork's former colleague at Yale Law School and one of the most influential First Amendment scholar of this generation, does not see in the First Amendment a "political core." See, e.g., Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 871 (1971); The System of Freedom of Expression (1970).

has only grudgingly -- and recently -- said that he would extend protection to artistic expression. As late as June 10, 1987, Judge Bork stated in a public interview that artistic expression is only at the outermost periphery of the First Amendment.[101]

At the hearings, Judge Bork stated:

> [T]here are all kinds of forms of expression, discourse, literature, that seriously affect the way we view our society and the way we view ourselves, and so forth. And I am willing to protect that.[102]

Judge Bork suggested that he would extend First Amendment protection to artistic speech, even if the speech did not, as he had previously required, "feed into the way we govern ourselves":[103]

Sen. Leahy: ... Then is the relationship to the political process irrelevant to whether government could ban the publication?

Judge Bork: Under current law, it is, and its a law that I accept.[104]

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[101]Unpaginated Transcript, Public Affairs Television, Inc., Movers: In Search of the Constitution #107 Strictly Speaking, Attorney General Edwin Meese and Judge Robert Bork (Airdate May 28, 1987).

[102]Sept. 17, 1987, Morning Session at 7-2.

[103]Unpaginated Transcript, Public Affairs Televisions, Inc., Movers: In Search of the Constitution #107 Strictly Speaking, Attorney General Edwin Meese and Judge Robert Bork (Airdate May 28, 1987). Earlier, Bork would only protect expression that directly "feeds the democratic process," which he said does not include "works of art" because their relationship to the political process is "indirect" and, thus, do not differ from "sports or business." See also Bork, Unpublished Speech, "The Individual, the State and the First Amendment," supra.

[104]Sept. 17, 1987, Morning Session at 31-2.

Judge Bork's explanation for his new view does not suggest commitment to either principle or original intent. Rather, he testified that to base First Amendment protection on the relationship between artistic speech and the political process would

> place too great a burden upon courts to sit down and ask whether this thing feeds the democratic process.[105]

Profanity

At the same time, Judge Bork did not modify his view that the First Amendment allows a local community to ban speech it finds offensive. At one point, Judge Bork implied that the First Amendment would protect speech considered morally offensive if it embodied political content:

> [I]f you read the Tropic of Capricorn by Henry Miller, you find a lot of stuff in there that is really political . . . so that those things would be protected.[106]

Nevertheless, Judge Bork apparently continues to reject

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[105]Sept. 17, 1987, Afternoon Session at 31-2; See also id. at 32-1.

[106]Sept. 17, 1987, Afternoon Session at 30-2. This position is inconsistent with Bork's prior analysis. In 1978 he argued:

> The notion that expression must be protected if, in addition to pornography or obscenity, it contains an idea is equally unsupportable... [I]t hardly seems dangerous to say that ideas may be expressed in many ways, but not in a context of the obscene."

Bork, Unpublished Speech, "The Individual, The State and Some First Amendment Problems," supra, at 15.

Justice Harlan's famous decision in Cohen v. California.[107] In reversing the criminal conviction of a young man who wore a jacket bearing a four-letter expletive to describe this country's draft policy, Justice Harlan had quoted Justice Frankfurter:

> "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures -- and that means not only informed and responsible speak foolishly and without moderation."[108]

Judge Bork, by contrast, would permit the government to punish even political speech -- Cohen was given 30 days' imprisonment-- where the mode of expression is less than genteel.

So, too, Judge Bork reiterated his disapproval of Hess v. Indiana,[109] where the Court protected a political activist's use of a profane word in the presence of a sheriff during a political demonstration. Even the dissent in Hess did not object to the use of profanity in the circumstances presented. Judge Bork, however, testified:

> I'm not so wild [about] Hess v. Indiana. That's a case of obscenity in the public streets. ...[110]

Thus, Judge Bork continues to read the First Amendment in a way

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[107] 403 U.S. 15 (1971).

[108] Id. at 261, quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944).

[109] 414 U.S. 105 (1973).

[110] Sept. 17, 1987, Afternoon Session at 38-1. See also Sept. 16, 1987, Afternoon Session at 7-2; id. at 10-2.

that allows a local majority to punish minorities for using words that the majority finds offensive, even in the context of political statements.[111]

Pornography

In equal measure, Judge Bork reaffirmed his unwillingness to extend First Amendment protection to sexual expression protected by court precedents:

> Sen. Specter: In ... 1984 ... you say you continue to think obscenity and pornography do not fit the rationale for protection. .. Have you changed your view on that?
>
> Judge Bork: No, I have not, Senator.[112]

Judge Bork's explanation for denying protection to pornography is directly counter to his explanation for extending protection to artistic expression. Judge Bork would deny

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[111]Senator Leahy asked why, in Pinger v. Barry, 798 F.2d 1450 (D.C. Cir. 1976), Judge Bork had upheld "a statute which say[s] to Americans: 'You can say certain things but not other things.'" Sept. 17, 1987, Afternoon Session at 27-1. Bork answered:

> ... I tried to deal with that concern. In a way, saying, "You may not say anything," is a more restrictive statu[t]e than saying, "You may not say - you may not insult a foreign government."

Sept. 17, 1987, Afternoon Session at 27-1.

Senator Leahy, echoing Supreme Court doctrine, remarked: "I find it more chilling to say that "We will select what could be said." Ibid. The Supreme Court has granted certiorari. See Boos v. Barry, 107 S.Ct. 1282 (1987).

[112]Sept. 16, 1987, Afternoon Session at 11-2; see also Sept. 17, 1987, Afternoon Session at 34-1.

protection to pornography because:

> The attitudes, tastes and moral values inculcated do not stay behind in the theatre. A change in ... attitudes toward sex, marriage, duties toward children and the like may be surely felt as harm ... But again, I'm talking about pornography."[113]

Judge Bork would protect artistic speech because:

> [T]here are all kinds of forms of expression, discourse, literature, that seriously affect the way we view our society and the way we view ourselves, and so forth. And I am willing to protect that.[114]

In denying protection to pornography, Judge Bork would allow the local majority broad power to regulate matters of "morality and civility."[115] His expansive view of pornography could empower a local community to suppress great literature -- Ulysses or Tropic of Cancer -- simply because the language "offends[s] the squeamish."[116] Neither work, of course, deals with our society or how we view it.

Civil Disobedience and Subversive Speech

[113] Ibid.

[114] Sept. 17, 1987, Morning Session at 7-2 (emphasis added).

[115] Bork, Unpublished Speech, Attorney General's conference, Williamsburg, a. (1986).

[116] Ibid.

For the first time "in public"[117], Judge Bork stated his agreement with the Brandenburg v. Ohio "clear and present danger" test:

Sen. Leahy: Do you agree with the Brandenburg case?

Judge Bork: Yeah, I do.[118]

Judge Bork described his prior disagreement with Brandenburg as follows:

> I think what I thought was wrong with Brandenburg then [as set forth in Bork's 1978 speech was that it didn't take sufficient account of the dangers. ... I now think that this society is not susceptible to that ..."[119]

Judge Bork's testimony is inconsistent with views expressed prior to the hearings, in which he categorically denied protection to subversive speech as a matter of constitutional law and saw the issue of "dangers" as merely a prudential concern relevant to legislative judgment. Judge Bork wrote in 1971: "Advocacy of law violation does not qualify as political speech."[120] In a 1979 speech, Judge Bork also stated:

> Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment.

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[117]Sept. 16, 1987, Afternoon Session at 7-2.

[118]Sept. 16, 1987, Afternoon Session at 6-1.

[119]Id. at 8-1, 8-2; see also id. at 6-2.

[120]Bork, Neutral Principles and Some First Amendment Problems, supra, 47 Indiana L.J. at 31. See also id. at 34 (there is no plausible analysis to show that subversive advocacy merits constitutional protection.)

> Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule.[121]

Judge Bork attempted to minimize the importance of this unexpected "conversion":

> This isn't a great change of mind. ... I accept the fact that the Supreme Court has added an additional safeguard for free speech, advocating lawlessness.[122]

Under questioning, however, Judge Bork conceded the significance of this shift:

> Sen. Specter: There is really an enormous difference between the principles you articulate ... and what the clear and present danger test ... and Brandenburg stands for, isn't there?"
>
> Judge Bork: Oh, that's correct, Senator ...[123]

Undeterred, Judge Bork tried to narrow the gap between his well-known views and his current position by mischaracterizing the Brandenburg test. He said:

> Brandenburg, I suppose, lies somewhere in the spectrum between my position ... and the clear and present danger test.[124]

Senator Specter set the record straight, pointing out not only

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[121]Bork, Unpublished Speech, "The Individual, the State, and the First ...endment," supra, at 21 (emphasis added).

[122]Sept. 17, 1987, Afternoon Session at 29-2.

[123]Sept. 17, 1987, Afternoon Session at 36-1.

[124]Id. at 37-1.

that Brandenburg embodies the Holmes-Brandeis clear and present danger test, but also that Judge Bork himself had earlier acknowledged that fact.[125] In a 1979 speech, Judge Bork said:

> The Holmes-Brandeis position held that virtually the only harm caused by speech that society can protect itself against is the prospect of imminent violence. ... [T]hat reading was imposed upon the First Amendment in the last year of the Warren Court in Brandenburg v. Ohio.[126]

Despite Judge Bork's acceptance of Brandenburg, he continues to believe that the case was wrongly decided: "All I am telling you is I now accept as a judge the position that the law has reached. ... But that does not mean that I have abandoned my original critique of those theories."[127] This leaves open the question of how Judge Bork would handle issues in future cases that conflict with his restricted notion of what should be protected by the First Amendment.

Judge Bork's Revisionism Should Not Be Given Great Weight

Judge Bork's life-long opposition to affording expansive

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[125] Id. at 40-2.

[126] Bork, Unpublished Speech, "The Individual, the State and the First Amendment," supra, at 21. Legal scholars generally recognize that Brandenburg embodies and then goes slightly beyond the Holmes-Brandeis clear and present danger test by allowing punishment only if the speech creates a danger of imminent lawless action and is intended to do so, while the original test required only actual danger or "intent". Thus, if different from the clear and present danger test, Brandenburg is further from, not closer, to Bork's prior position.

[127] Sept. 17, 1987, Afternoon Session at 40-1.

protection to free speech should be given far greater weight than any last minute statement offered at the hearings. The inaccuracies, inconsistencies, and distortions that mark Judge Bork's testimony suggest less a jurist who has evolved in his acceptance of Supreme Court doctrine than a person unable to rationalize a hastily adopted stance. And despite recantations, Judge Bork in fact reaffirmed his fundamental opposition to a number of key Supreme Court doctrines in the First Amendment area. At bottom, his ambiguous reformulation would permit Judge Bork to give the majority broad power to censor speech in the name of "community morality"[128] or the "social agenda,"[129] and so chill the creative and dissident voices of America's people.

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[128]Bork, Unpublished Speech, University of California, Berkeley, Ca. pr. 29, 1985), p. 7.

[129]Bork, Statement to the Senate Judiciary Committee, Sept. 15, 1987, ternoon Session. In his opening statement, Judge Bork said that judges ided to be restrained from reading values into the Constitution. When a ge finds values that the framers and ratifiers did not put there, he rives the people of their liberty. He characterized that liberty as the berty of the people to set their own social agenda through these processes democracy." In his speeches and writings Judge Bork has put the societal erty interest quite differently. He has made it quite clear that he lieves that "one of the freedoms, the major freedom, of our kind of society the freedom of choice to have a public morality." See Bork, "Tradition and ality in Constitutional Law," American Enterprise Institute on Public icy Research (The Francis Boyer Lecture of Public Policy 1984), at 9. s, his use of a more benign term "social agenda" may be an attempt to ten — if not hide — the core of his judicial philosophy: that the stitution was principally designed to permit the majority the liberty to mplish its objectives, and that the principal liberty of the majority is mandate morality. See Bork, "Tradition and Morality in Constitutional ," supra; Bork, Morality and the Judge, Harper's 28, 29 (May 1985).

Expanding the Imperial Presidency

Over the years, Judge Bork has offered an extreme view of executive power which severely limits Congress, the courts and our civil liberties. At the hearings, Judge Bork did not retreat from those views.

Judge Bork reiterated that he would allow the President broad power, unfettered by congressional restraint, to use military force in foreign affairs. Judge Bork testified that the War Powers Act would be unconstitutional if "it leads to micro-management of tactical decisions in a conflict by Congress."[130] When questioned about his statement that it would be "unconstitutional for Congress to stop the President from invading Cambodia,"[131] Judge Bork replied:

> ... As far as Vietnam is concerned, Congress could have cut off the funds and ended that war whenever. ... My only question was the question of tactics within a war.[132]

The extent of Presidential power that Judge Bork asserts is made clear by his statement in 1971:

> It is completely clear that the President has complete and exclusive power to order tactical moves in an existing conflict, and it seems to me equally clear that the Cambodian incursion was a tactical maneuver

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[130] Sept. 19, 1987, Afternoon Session at 19-2, 20-1. See also Sept. 17, 1987, Morning Session at 16-2, 17-1.

[131] Id. at 17-1.

[132] Ibid.

and nothing more.[133]

Judge Bork's testimony that Congress cannot restrict the President's tactical moves is especially significant since Judge Bork believes "tactics" to include invasion of a sovereign nation with which we are not at war.[134]

Judge Bork also reaffirmed that he would accord the executive exclusive power in other contexts as well. Thus, Judge Bork repeated his view that Congress could not require the government to obtain a warrant before engaging in electronic surveillance of United States citizens in a national security case:

> Sen. Kennedy: In 1978 you testified ... "The plan of bringing the judiciary a warrant requirement .. into the field of foreign intelligence is ... a thoroughly bad idea and almost certainly unconstitutional ..." ... Have you [since] expressed a different view regarding the Act?
>
> Judge Bork: I don't recall that I have Senator, but let me explain that view. Every President ... since Franklin Roosevelt has claimed the power to engage in electronic surveillance of foreign agents without a court warrant...[135]

Although Judge Bork dubbed the warrant requirement a "bad idea," the Senate had voted in its favor, 95-1, and FBI and now CIA Director William Webster said it had "worked beautifully."[136]

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[133] Bork, Comments on the Legality of U.S. Action in Cambodia, 65 Am. J. Int'l. Law at 79-80 (1971).

[134] Ibid.

[135] Sept. 17, 1987, Morning Session at 17-2.

[136] Id. at 18-1.

Judge Bork also continued to insist that executive action can be shielded from the checks-and-balances of public scrutiny. The Supreme Court in United States v. Nixon[137] has recognized a limited privilege on behalf of the President to immunize confidential presidential conversations from disclosure. Scholars have criticized the privilege, noting that it is "mentioned neither in the Constitution nor in the constitutional debates."[138] Judge Bork, by contrast, testified:

> ... I think I said there was reason to believe that those officials who are part of the presidency, and who communicate with the President, might have executive privilege to that extent.[139]

Judge Bork suggested that he did not approve delegation of the privilege to executive agents.[140] This testimony, however, is inconsistent with views expressed as a judge. Just this year, Judge Bork wrote:

> If, as it appears, OMB's rulemaking oversight here at issue is a delegation [by the President], this delegation to be effective should carry with it the delegation of the President's constitutional privilege.[141]

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[137] 418 U.S. 687 (1974).

[138] Tribe, American Constitutional Law 202 (1978).

[139] Sept. 15, 1987, Afternoon Session at 22-1.

[140] Ibid.

[141] Wolfe v. Dept. of Health and Human Services, 815 F.2d 1527, 1539 (D.C. Cir. 1987) (Bork, J., dissenting).

Judge Bork's expansive view of executive power was also evident in his testimony on the so-called Saturday Night Massacre. In defending the legality of his decision to fire the Special Prosecutor, even though contrary to a regulation that had the force and effect of law,[142] Judge Bork said:

> [T]hose cases [holding that an executive department may not discharge one of its own officers in a manner inconsistent with its own regulations] do not apply to a case where the President orders him - the President gives an order to abolish the regulation, which is, in effect, what happened.[143]

Judge Bork himself recognized that the regulation had not been amended or eliminated. As the Supreme Court put it, "As long as [the] regulation is extant it has the force of law."[144]

Judge Bork did not express a view on the constitutionality of the Independent Counsel Act.[145] However, he denied that his 1973 criticisms of a proposed special prosecutor act would apply to the current act.[146] These earlier criticisms focused on

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[142]Sept. 16, 1987, Morning Session at 1-1.

[143]Id. at 2-1.

[144]United States v. Nixon, 418 U.S. 683, 695 (1974).

[145]Sept. 17, 1987, Morning Session at 19-1 - 19-2.

[146]Id. at 19-1.

control of the prosecutor by the courts.[147] However different in detail, the Independent Counsel Act still involves judicial control over the prosecutor's appointment and termination, to which Judge Bork had earlier objected.

Judge Bork's testimony offered a spirited defense of an imperial presidency, which exercises power at the expense of Congress. His negative view of Congress, formed as an antitrust lawyer, seems never to have altered. In the antitrust context, Judge Bork wrote:

> That the lawmaking process has performed inadequately ... [is] both self-evident and an understatement ...
>
> Congress as a whole is institutionally incapable of the sustained, vigorous, and consistent thought that the fashioning of a national antitrust policy requires. ...[148]

He added:

> Large bodies simply do not reason coherently together. ...
>
> [A]ny future congressional participation is likely to make matter worse ...
>
> The fact that the lawmaking process has not worked well in antitrust may have significance beyond the bounds of that field.[149]

Judge Bork's testimony, calling for unlimited presidential power,

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[147] Ibid.

[148] Bork, The Antitrust Paradox A Policy at War With Itself, 409, 412 (1978).

[149] Id. at 412, 413, 417.

in no way repudiates this basic dimunition of the role of the Congress.

Disregarding the Role of Precedent

Judge Robert Bork has made a career out of criticizing and calling for reconsideration of landmark Supreme Court decisions that he considers unsupported by the text of the Constitution or the intent of its framers. Until the hearings, Judge Bork had not seen the doctrine of stare decisis as an impediment to reconsideration of "unconstitutional" decisions. In his view, judges "have a right, indeed a duty, to require a basic and unsettling change when the Constitution, fairly interpreted, demands it."[150] Indeed, prior to the hearings, Judge Bork urged that "[d]emocratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views."[151]

In his testimony, Judge Bork attempted to moderate his extreme views on precedent and stare decisis. In his opening statement, Judge Bork described his judicial philosophy in the following terms:

> [T]he judge must speak with the authority of the past and yet, accommodate that past to the present. The past, however, includes not only the intentions of those who first made

[150]Bork, Unpublished Speech, Seventh Circuit Judicial Conference, Chicago, Illinois (1981), at 7.

[151]Bork, Judicial Review and Democracy, Society 5, 6 (Nov./Dec. 1986).

> the law; it also includes those past judges who interpreted it and applied it in prior cases. That is why a judge must have great respect for preceden[t].[152]

Judge Bork assured Committee members that he would not lightly overrule decisions he had sharply criticized only months before. To this end, he stated that "a case should not be overruled unless it was clearly wrong and perhaps pernicious ... in the sense of having dynamic force ... that would produce new wrong decisions."[153] Judge Bork also testified that "a number of factors counsel against overruling:"

> For example, the development of private expectations on the part of the citizenry. Is [there] an internalized belief in a right? The growth of institutions, governmental institutions, private institutions, around a ruling.[154]

Judge Bork gave few examples of doctrines it is "simply too late to go back and tear ... up."[155] These include decisions interpreting Congress' power to regulate under the Commerce Clause,[156] the legal tender cases,[157] and the incorporation

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[152]Sept. 15, 1987, Afternoon Session at 6-1.

[153]Sept. 17, 1987, Morning Session at 3-1.

[154]Sept. 16, 1987, Afternoon Session at 22-1 - 23-1; see also Sept. 15, 1987, Afternoon Session at 23-1 - 23-2; Sept. 16, 1987, Morning Session at 36-1.

[155]Sept. 15, 1987, Afternoon Session at 8-1.

[156]E.g., id. at 8-1 - 9-2; Sept. 16, 1987, Morning Session at 37-1; Sept. 17, 1987, Afternoon Session at 38-1; Sept. 18, 1987, Morning Session at 3-1.

doctrine.[158]

This new-found respect for precedent appears to be another example of "confirmation conversion." For over 35 years, in speeches, articles, interviews and authored opinions, Judge Bork has displayed little respect -- and often outright contempt-- for precedent and for the doctrine of stare decisis. After a speech at Canisius College in 1985, Judge Bork responded as follows to a question about the role of precedent:

> I don't think that, in the field of constitutional law, precedent is all that important. ... [I]f you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it.
>
> Moreover, you will, from time to time, get willful courts who will take an area of law and create precedents that have nothing to do with the meaning of the Constitution. If a new court comes in and says, "Well, I respect precedent," which has a ratchet effect, with the Constitution getting further and further and further away from its original meaning because some judges feel free to make up new constitutional law and other judges, in the name of judicial restraint, follow precedent.
>
> I don't think precedent is all that important. I think the importance is .. what the framers were driving at and you've got to get back to that.[159]

Although Judge Bork attempted to downplay the significance of

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[157] E.g., Sept. 15, 1987, Afternoon Session at 8-1 - 8-2; Sept. 18, 1987, Morning Session at 3-1.

[158] Sept. 17, 1987, Afternoon Session at 44-2; Sept. 18, 1987, Morning Session at 3-1.

[159] Sept. 18, 198, Afternoon Session at 4-1 - 4-2 (audio tape played at hearings) (emphasis added).

this statement -- calling it "a quick answer," "not a prepared statement"[160] -- it is consistent with the disrespect he has shown over the years for "non-originalist" precedent. For example, in remarks made this year to the Federalist Society in Washington, D.C., Judge Bork also stated: "I would think that our originalist judge would have no problem overruling a non-originalist precedent, because that precedent, by the very basis of his judicial philosophy, has no legitimacy."[161] Similarly, in an interview in 1985, the following exchange took place:

> Q: But subject to that kind of prudential restraint where people have relied on precedents or bodies of legal doctrine, your view would be that a justice is entitled as part of his responsibilities to reexamine constitutional questions de novo?
>
> A: I think that's true of a justice and true of a lower court judge, unless he's bound by Supreme Court precedent, After all, there are a lot of considerations that go into it, but at bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.[162]

This view of precedent follows from Judge Bork's premise that "original intent is the only basis for constitutional decision-

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[160] Sept. 18, 1987, Afternoon Session at 6-1.

[161] Transcript, Speech to Federalist Society, Washington, D.C. (Jan. 31, 1987), p. 126.

[162] Lacovara, "A Talk With Judge Robert H. Bork," supra, 9 District Lawyer at 32 (emphasis added). See also Barnes v. Kline, 759 F.2d 21, 56 (D.C. Cir. 1985) (Bork, J., dissenting) ("the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution").

making."[163]

When confronted with these conflicting statements, Judge Bork pointed out that in many of his speeches, and in the interview quoted above, he has indicated that the Commerce Clause cases should not be overturned, even if they are inconsistent with the framers' original intent. However, Judge Bork has not based this position on a general respect for precedent. Rather, he has simply recognized that these are "constitutional decisions around which so many other institutions and people have built that they have become a part of the structure of our nation" and it is simply too late to overturn them.[164]

On the basis of criteria used in his testimony, Judge Bork has left himself free to "tear up" any precedent he considers "pernicious" as well as wrong. His view of stare decisis in fact leaves the Bill of Rights vulnerable. Judge Bork has written:

> [T]he courts' treatment of the Bill of Rights is theoretically the easiest to reform. It is here that the concept of original intent provides guidance to the courts and also a powerful rhetoric to pursuade the public that the end to [judicial] imperialism is required and some degree of reexamination is desirable.[165]

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[163]Bork, Constitutional Law, Original Intent, and Economic Rights, supra, San Diego Law Review at 823.

[164]Lacovara, "A Talk With Judge Robert H. Bork," supra, 9 District Lawyer 32.

[165]Bork, Unpublished Speech, "Federalism," Attorney General's Conference, lliamsburg, Va. (Jan. 24-26, 1986), at 9.

Particularly in view of his originalist philosophy, Judge Bork's testimony provides no assurance that the doctrine of stare decisis would prevent a Justice Bork from conducting "a general spring cleaning of constitutional law."[166]

Conclusion

Over the years, Judge Bork has made explicit the extreme and unconventional nature of his radical judicial philosophy. As the Senate Judiciary Committee confronted Judge Bork -- and more and more Americans discovered that Judge Bork is far from the mainstream of contemporary legal thought -- Judge Bork attempted to distance himself from his own philosophy. He also sought to minimize the importance of judicial philosophy to the work of the Court.

By contrast, before the hearings, Judge Bork underscored that the future of the Supreme Court -- and so of our liberties -- depends on the judicial philosophy of those who would assume the role of Justice. Bork wrote:

> The only real control the American people have over their judges is that of criticism -- criticism that ought to be informed. Criticism focused not upon the congeniality of political results but upon the judge's faithfulness to their assigned role. Judges ought to make explicit how they perceive

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[166] Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir. 1984).

their assigned role.[167]

He also stated:

> We appear to be at a tipping point in the relationship of judicial power to democracy. The opposing philosophies about the role of judge are being articulated more clearly. ... The future role of the American judiciary will be decided by the victory of one set of ideas over the other.[168]

Despite moments of "confirmation conversion," despite recantations and obfuscations, Judge Bork's judicial philosophy has remained radical and extreme and is unlikely to undergo significant moderation. Again, Judge Bork has written:

> * * * It may be that the Court is not a particularly good place for rethinking philosophies. Cases and subjects [come] up in almost random order and the press of work is heavy so that rethinking, really rethinking an entire philosophy must be next to impossible. The Justice must usually live on such intellectual capital as he already possesses, rather than accumulating more.[169]

The grounds for the confirmation decision by the Senate, therefore, remain Judge Bork's lifetime of work, including a judicial philosophy that would radically alter the role of the Supreme Court as a guardian of our liberty. If his philosophy

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[167]Bork, The Constitution, Original Intent, and Economic Rights, supra, 3 San Diego L. Rev. at 824.

[168]Ibid.

[169]Bork, "Inside" Felix Frankfurter (Book Review), 65 Public Interest 108, 112 (Fall 1981).

were to prevail, it could seriously jeopardize the fundamental rights and freedoms of today's Americans and those of generations to come. His nomination should be rejected by the United States Senate.

STATEMENT OF MARVIN E. FRANKEL
FOR THE AMERICAN JEWISH CONGRESS
ON THE NOMINATION OF JUDGE ROBERT H. BORK
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 30, 1987

I am a practicing lawyer in New York City. I have at times in the past been a federal district judge (1965-78) and a professor at the Columbia Law School (1962-65). I am Chairman of the Lawyers Committee for Human Rights and a board member of several other human rights organizations. I am a co-chair of the Commission on Law and Social Action of the American Jewish Congress. I appear here today on behalf of the latter organization in support of our position that the Senate should withhold its consent to the nomination of Judge Robert H. Bork for the post of Associate Justice of the Supreme Court of the United States.

The American Jewish Congress is a membership organization founded in 1918 to protect the religious, political and economic rights of Jews and to promote the principles of democracy. Given our own history and our fundamental beliefs, we have acted always on the conviction that the civil and religious rights of Jews can be secure only if the rights of all Americans are equally secure. We have been concerned especially with the freedom of conscience -- the freedom to think, to worship or not

to worship, to believe or disbelieve, as each individual human being determines for himself or herself. It is our conviction that this freedom is best safeguarded by the constitutional principle separating religion and government from each other. In a nation of minorities, we cherish the vital premise that the morality of the majority must not control or dictate private thought, belief, or conduct that does not injure or infringe upon others. Beyond that, we have been devoted consistantly to advocacy against racism and on behalf of poor people and other disfavored groups suffering indivious treatment, neglect, or oppression at the hands of those who exercise the authority of government.

We have over the years supported our ideals in scores of briefs submitted to the Supreme Court of the United States -- often as a friend of the Court, sometimes as counsel to a party. In this way, we have been privileged to participate in many of the wonderful cases through which the Court has implemented the great freedoms and the great rights protected by the constitutional jurisprudence of the last half-century or so. A representative but by no means complete sampling of such cases would include the following:

- Shelley v. Kraemer, 334 U.S. 1 (1948), barring court enforcement of racially restrictive covenants.

- McCollum v. Board of Education, 333 U.S. 203 (1948), holding that a "released time" program permitting religious instruction in public schools violated the Establishment Clause.

- Burstyn v. Wilson, 343 U.S. 495 (1952), recognizing First Amendment protection for motion pictures, despite their status as entertainment.

- Brown v. Board of Education, 347 U.S. 483 (1954), holding unconstitutional "separate but equal" public schools.

- Flast v. Cohen, 392 U.S. 83 (1968), upholding taxpayer standing to challenge governmental aid to religious schools.

- Shapiro v. Thompson, 394 U.S. 618 (1969), invalidating residency requirements for welfare beneficiaries.

- Wisconsin v. Yoder, 406 U.S. 205 (1972), upholding the Free Exercise right of the Amish to remove their 14-year-old children from public schools.

- Doe v. Bolton, 410 U.S. 179 (1973), striking down limitations on abortion rights.

- Aguilar v. Felton, 473 U.S. 402 (1985), barring the use of Title I funds for remedial courses in religious schools.

- Edwards v. Aguillard, 107 S. Ct. 2573 (1987), striking down on establishment clause grounds a law mandating "balanced treatment" of creationism in the public school curriculum.

This sampling of our work in the Supreme Court reflects the human and constitutional values that have led us to conclude that we must oppose the confirmation of Judge Bork as an Associate Justice.

We have come to this sobering conclusion by comparing the basic premises and rulings of the Supreme Court during the last 40 years or so with the extensive expressions of Judge Bork's approach to the Constitution and the judicial process. The comparison leads compellingly to these stark propositions:

First, Judge Bork has been in sharp, often acerbic and even somewhat scornful, disagreement with almost all of the landmark cases safeguarding human rights -- the

security, dignity, and autonomy declared in those cases to be the entitlement of all human beings.

Second, Judge Bork would deem himself commissioned as a Justice of the Supreme Court -- and probably driven by his principles -- to overrule at least some of these significant cases because they lack warrant in the "originalist" position he espouses.

Third, as undecided questions under the Bill of Rights come to the Court in the long years ahead, his approach may be expected to reflect the hostile and grudging reaction to human rights claims that has characterized his steadily expressed philosophy in the past.

In short, upon the extensive evidence from which predictions of this nature must be fashioned, we are driven to foresee that Judge Bork would be a potentially decisive voice and vote for turning the constitutional clock back to where it was before the vital advances of recent years. This is unquestionably the forecast upon which his nomination has been made. The President and his chief legal officers have proclaimed forcefully and repeatedly their resolve to undo many of the constitutional landmarks we cherish by seeking to have overruled decisions they denounce as departures from the Framers' "original intent." They have made no secret of their purpose to pursue this objective through one of the few available means, as it has been noted by

Judge Bork himself among others -- namely, the appointment process.[1/] This is a reality surely embraced by the Constitution. But the Senate's role of "advice and consent" is on no different plane.

The President has chosen to exercise the appointment power with the seeming purpose to effect deep and radical changes in the course of our constitutional history. This has happened on rare occasions in our past -- as in Franklin Roosevelt's tenure. At every such juncture, the Senate must judge in its collective wisdom whether the sharp change of course is in the Nation's best interests, not only for the moment but for a long time to come.

At this stage of the hearings, I shall try to minimize repetition of the materials this Committee has reviewed at length. My effort will be to summarize in concrete but reasonably brief terms the major factors underlying the position of the American Jewish Congress.

1/ Bork, Judicial Review and Democracy, Society 5,6 (Nov.-Dec. 1986).

On overruling or confining
the great precedents

If he is confirmed as an Associate Justice, Judge Bork will enlist in a taxing and often agonizing process. After all the briefs and arguments and conferences, he will be called upon to vote as his judicial conscience dictates. That means he will be consulting in the end his deep professional convictions concerning the Constitution, the laws and, above all, the judicial process. So it was to be expected that this Committee and the Nation would be looking with interest at his extensive public expressions on these subjects.

As the Committee well knows, during the recent years when his name has figured prominently on the list of potential candidates for the Supreme Court, Judge Bork has spoken repeatedly and vigorously on the relevant subjects. Addressing some of the decisions most highly prized by human rights advocates, he has said they were not and are not "legitimate;" that they are "unconstitutional;" that many of them amount in their lawlessness to "limited coups d'etat." Such strong characterizations, among others, have been applied to cases involving the right of abortion, marital and other privacies, the principle of one person, one vote, the rejection of "illegitimacy"

as grounds for invidious treatment under the law, and other decisions extending rights of individual dignity and antonomy.2/

If these repeated statements of principle have fairly reflected Judge Bork's mature thinking, they should lead him to vote for overruling a number of key precedents. As he put it earlier this year, "an originalist judge [like him] would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended."3/

One hears, however, that Judge Bork has modified a number of his recorded views. This Committee and the Senate will be pondering that. It raises no question about the Judge's felt and intended candor to say that the revisions must give pause. Experience does not teach that people undergo dramatic transformations in moving from the academy to the bench. Frankfurter did not. Nor did Douglas. No contrary examples come to mind. Moreover, Judge Bork has reaffirmed many of his stated principles

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2/ See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 12, 15-17 (1971); Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 5, at 13, 17 (1973).

3/ Remarks on the Panel, "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, p. 126.

while sitting on the D.C. Circuit. This is in any event a mature and thoughtful man, 60 years old. Significant changes of outlook and philosophy are not common at that age. To be sure, history reports some conversions more momentous than the ones now in question. But the question of change is something to conjure with.

With understandable and well-founded reluctance, Judge Bork has come close to giving assurances that he will not vote to overrule a number of the landmark decisions extending the protections of the Bill of Rights (while reserving judgment on some others). Accepting those assurances as they were given, in good faith and under oath, we are still left to assess what they mean for the future. Judge Bork surely has not forsaken the fundamental attitudes and principles matured over the years of his professional life. Indeed, he has expressed his own sense of the matter by telling us that a judge's basic philosophy may be expected to be what it had become before he went on the bench. He has observed that the judicial work load blocks out the quiet time needed for the rethinking of basic premises. "The Justice," he states, "must usually live on such intellectual capital as he already possesses, rather than accumulating more."4/

4/ Bork, Book Review, The Enigma of Felix Frankfunter, 65 Public Interest 108, 112 (1981).

Given his firmly stated principles, therefore, what are we to make of Judge Bork's assurances that he will not vote to overrule some or all of the decisions he has castigated? All lawyers know that there are many techniques short of overruling by which precedents in our system are stripped of their force. A prior decision may be distinguished to death or "confined to its facts," as Judge Bork, correctly or not, indicates has happened to Shelley v. Kraemer, 334 U.S. 1 (1948). A prior decision confined in this fashion becomes a kind of zombie in the law. Its value is a thing of the past.

Looking to the future, then, the critical question remains as to what Judge Bork's legal principles and philosophy portend for his performance as a Justice. For this purpose, the prior revelations of his thoughts and his dispositions remain matters of capital significance. Both the intellectual and the emotional qualities of a human being are major clues to expected performance as a judge or justice. We have considered in this light what is known and reasonably predictable about Judge Bork. The results of this appraisal are disquieting.

The mind set against liberty, antonomy, and equality

Observing Judge Bork and his spectacular performance before this Committee, one sees a man of wit, learning, and personal force. One is led to reconsider, and to reconsider

still again, what his many recorded expressions foretell about how he would perform as a Justice. In the end one returns to the regretful but firm conviction that the Judge is wanting in qualities essential for the appreciation and enforcement of fundamental human rights. Both the substance and the style of his writings reveal a mind set indifferent or cool, to the point of being cold, toward the claims of disfavored minorities, unpopular groups and individuals, the weak and the unorthodox. We are driven to concur in the views of others who perceive the Judge as lacking in the compassion, the warmth, and the generosity required for sound assessment of human rights claims. Through occasional shifts of stated philosophic doctrines, these important failings appear as constants.

It is chilling to read an analysis that trivializes as equal "gratifications" the pollution of the environment to produce electricity and the decision whether to use contraceptives in the marital bedroom. The demand for "neutral principles" embracing both or neither leaves humanity out of the equation.5/

Demanding a satisfactory theory from the proponents of human rights, and neither finding one nor able to fashion one himself, Judge Bork has condemned the Supreme Court not only for

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5/ See Neutral Principles, 47 Ind. L.J. at 9-10.

its privacy decisions but for such things as its ruling (unanimously) against Oklahoma in a "sensitive and important area of human rights", Skinner v. Oklahoma, 316 U.S. 535, 536 (1942), when it denied the State's power to sterilize a robber but not an embezzler; for denying state power to impose minimum residency requirements as barriers to the subsistence needs of people seeking welfare, Shapiro v. Thompson, 394 U.S. 618 (1969); for barring arbitrary discrimination against the children of unwed parents, Levy v. Louisiana, 391 U.S. 68 (1968); and for outlawing the poll tax, employed, as everyone knew, for purposes more sinister than raising revenue, Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).6/ Another unanimous decision, joined in by former Professors Douglas and Frankfurter, Shelley v. Kraemer, 334 U.S. 1 (1948), a milestone in the struggle to free the former slaves from purposeful subordination, is included in his list of indefensible departures from valid theory.

The Court has struggled over the years to formulate and adapt the shared sense that there must be an enclave where the human spirit and diverse ways of individual life are free from the heavy hand of the majority's demand for conformity. But Judge Bork, with a remarkable exception noted below, has set his face against any such effort. Whether it be called "privacy" or "liberty" or "substantive due process," the kind of antonomy the

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6/ See n.2 supra.

Court has continued to evolve is unacceptable to him. And so he reaches back 60 years and more to cast a pall even over such venerable beacons as Pierce v. Society of Sisters, 268 U.S. 510 (1925), striking down a state law forbidding attendance at non-public schools, and Meyer v. Nebraska, 262 U.S. 390 (1923), invalidating a state prohibition against teaching in any language other than English.7/

The Bill of Rights is of course a set of barriers protecting minorities and individuals against excessive and needless dragooning by the majority. But claims for such protection confront a steep and usually hopeless burden of persuasion in the judicial universe of Judge Bork. Unless the burden is borne by an unassailably valid "theory" or "justification," the claim of right must be denied. Under the principles espoused by Judge Bork, when this heavy burden is not sustained, the morality of the majority must prevail. For "[o]ne of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality."8/

7/ Judge Bork, after years of scholarship, finds himself "in political agreement" with some cases in this line, but knows of no "justification" for the decisions. Neutral Principles, supra, 47 Ind. L. J. at 11.

8/ Bork, American Enterprise Institute lecture, "Tradition and Morality in Constitutional Law," p. 9 (1984).

With the resulting antipathy of Judge Bork to the still developing conception of a right of privacy, contrast the affirmation by Justice Brandeis of "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (a classic and germinal dissent).

Against Judge Bork's normal disposition to resist such ideas, his writings contain at least one striking exception. In a piece this Committee has visited before now, in 1963, Mr. Bork, as he then was, spoke out strongly against "legislation by which the morals of the majority are self-righteously imposed upon a minority."9/ But what was the occasion? It was, as you know, a statement of robust opposition to the legislation, thereafter enacted, against racial discrimination in public accommodations. Mr. Bork found in that enactment an offensive "departure from freedom of the individual to choose with whom he will deal."10/ He declared it a "principle of unsurpassed ugliness" to employ "state coerc[ion]" for the imposition upon a supposed white minority of what he perceived as merely "moral or aesthetic" standards hospitable to blacks.11/

9/ Bork, "Civil Rights - A Challenge," The New Republic, August 31, 1963, p. 21.

10/ Id. at 22.

11/ Id.

Judge Bork has receded from that view of the public accommodations law. But the episode remains significant in weighing his moral and philosophic positions. And in considering his understanding of the world upon which the Supreme Court, like the Congress, exercises its powers. The relevant image for him was "tell[ing] a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion."12/ The awfulness of that prospect could include, he supposed, compelling "the choice of partners or associates" in a variety of businesses and professions.13/ In Mr. Bork's world, no account was taken of the black motorist driving with his family through a Southern night looking vainly for a motel that would give them shelter. While the philosophic view about imposing majority morality has changed, the bottom line then, as more recently, was a stance adverse to the disesteemed minority.

What comes through steadily is a sense that Judge Bork's underlying set and tendencies are against the interests of minorities and outsiders. Even where the majority seeks to serve those interests, that does not win his favor. From such portents as we have, this is a central feature of his thinking that seems likely to affect his positions on the First Amendment's religion clauses, to which we turn.

12/ Id.

13/ Id. What Mr. Bork saw as a terrible possibility is now, to some degree at least, the law of the land. See Hishon v. King & Spalding, 467 U.S. 69 (1984).

Church and State

Judge Bork has not written important opinions or engaged in extensive scholarship in the past touching the subject of church and state, a matter of special interest to the American Jewish Congress. He has spoken on this topic recently, however, and his thoughts are again harbingers of destruction from our point of view. Here, as in other areas, he is critical of the Supreme Court's work of the last 40 years, especially with respect to the establishment clause. The indications are that he would seek to decrease access to the federal courts in this as in other quarters; to blur or erase the salutary lines of separation between church and state; and to welcome religion into the public schools and into public life -- contrary to the care the Court has taken to avoid such dangerous mingling of the sectarian and the governmental.

At the threshold, Judge Bork has seen fit to criticize what he calls the "unexplained result" in Flast v. Cohen, 392 U.S. 83 (1968), which held that a federal taxpayer has standing to question federal expenditures for religious schools in asserted violation of the religion clauses. Looking to the historic words on this subject of James Madison, commonly invoked by Judge Bork for the constitutional wisdom he unquestionably gave us, we recall his expression of the underlying principle -- that a citizen should not be forced "to contribute three pence

only of his property for the support of any other [religious] establishment."[14/] As against the alternative suggested by Judge Bork, which would seemingly give no one standing to protest the building of temples and mosques with government money, Madison's words seem to us the beginning of an ample "explanation" for the rule of standing in Flast.

Looking at the church-state jurisprudence that has served America so well, Judge Bork joins those who seek its revision by rejecting, not necessarily after extensive study, the basic approach to this subject taken by the Supreme Court.[15/] This approach, as the Committee knows, has included prominently a three-pronged analysis for determining whether the establishment clause has been violated. As stated for the Court by Chief Justice Burger in 1971, the three tests are these:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."[16/]

14/ "Memorial and Remonstrance Against Religious Assessments," 2 Writings of James Madison 183, 186 (Hunt ed. 1901), quoted in Flast v. Cohen, 392 U.S. 83, 103 (1968).

15/ Bork, Unpublished Speech, "Religion and the Law," U. Chicago, Nov. 13, 1984, pp. 4-5. Essentially the same speech was given a year later at the Brookings Institute.

16/ Lemon v. Kurtzman, 403 U.S. 602, 612-13 (citations omitted).

With a single exception over the years, that analysis has been followed, down to the decision a couple of months ago barring the attempt to compel teaching of the majority religion in public schools under the rubric of "creation science."17/

Judge Bork has said the Lemon test is "not useful."18/ While he has proposed no other, he has made evident that the changes he would seek are, again, in the direction of dismantling the Bill of Rights protections as they now stand.

The Judge is correct when he says he is not alone in criticizing the Court's three-point formulation. There are difficulties and elements of untidiness in this particular way of treating some of the exquisitely close and difficult questions the Court has faced in this sector of the law. But the points of prime consequence for us are these: First, whatever its imperfections, the test has served the law and the Nation well by keeping clear for the most part the lines that prevent intrusions of government and religion upon each other. Second, Judge Bork does not merely seek a more academically satisfying doctrine -- he would weaken the Court's buttresses for the Bill of Rights once again by changing the test for the express purpose of lowering the safeguards.

17/ Edwards v. Aguillard, 107 S. Ct., 2573, 2577 (1987).

18/ Bork, Unpublished Speech, "Religion and the Law," U. Chicago, Nov. 13, 1984, pp. 4-5.

His view in a few words is that there is need for "relaxation" of what he describes as "current rigidly secularist doctrine."19/ The relaxation would lead, he says, to such "sensible" things as "reintroduction of some religion into public schools and some greater religious symbolism in our public life."20/

There is undoubtedly a constituency for such thoughts in America today. It includes those, recently rebuffed again by the Supreme Court,21/ who seek to banish the theory of evolution from the public schools or to "balance" it by teaching doctrines of revealed religion. It includes more broadly those who would have the religious morality of the majority backed by the endorsement and the force of the state.

We believe that in stemming this tide the Supreme Court's church-state jurisprudence to date has on the whole served admirably the comfortable diversity and open pluralism of this wonderfully free country. Judge Bork's elevation would give greater voice to a growing minority of uncertain dimension that would seek to change that. While the particular subject of church and state is in itself admittedly not free from debate, we

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19/ Id. at 15.

20/ Id.

21/ See Edwards v. Aquillard, 107 S. Ct. 2573 (1987).

perceive in his dispositions in this respect the same hostility to basic rights that characterize his total outlook. It enhances for us the crucial grounds for believing that his confirmation would disserve the public interest.

"Original Intent"

As mentioned earlier, Judge Bork has described himself as an "originalist," regarding the "original intent" of the Framers as a -- perhaps the -- cardinal principle of constitutional adjudication. It is important to have in mind that these words are in our time heavily charged labels importing commonly a distinct, and distinctly reactionary, approach to the Bill of Rights. Attorney General Meese leads the school that denounces the Supreme Court and the current state of constitutional law for departing from "original intent." He attributes to this asserted departure a long roster of grave "errors" -- including decisions on prayer in public schools, the right of privacy, and indeed the whole idea of incorporating most of the Bill of Rights into the freedom and protections extended to the individual by the Fourteenth Amendment. It is of high significance in this setting that Judge Bork should proclaim himself an "originalist."

It is of equal significance that most of us who care about human rights see the "original intent" slogan as a shorthand means of saying much of the constitutional structure we

value should be cut down or torn down. Purely as an intellectual matter, the concept is not a valuable or important one. No judge or justice really needs to be reminded that the Constitution is a text, made up of words, that the words had meanings of consequence for those who wrote them, and that those meanings remain important data for constitutional judgments today. But no law school graduate should need the additional reminder that the meanings of the words 200 years ago are far from the only data for decision.

Those who would undo the expanded constitutional safeguards evolved in this century would simply take the words of the Founders and an eighteenth-century dictionary as the sufficient guides to decision. Would those who wrote the Bill of Rights have forbidden the recitation of prayers written by public officials in the public schools -- if they had had or thought about public schools? If not, then the decision in Engel v. Vitale, 370 U.S. 421 (1962), is wrong, as Judge Bork appears now to think it is. Did the drafters of the Fourteenth Amendment think in terms of the privecies now protected by the decisional law? If not, the protections are illicit. Would the Framers have given the protection for the use of a dirty word extended by Justice Harlan's luminous opinion in Cohen v. California, 403 U.S. 15 (1971)? If not, then Justice Harlan's opinion amounts to illicit judicial law-making. The concept of "privacy" or "substantive due process" is not found in the 1787 annals or the

debates concerning the Fourteenth Amendment; its development during this century must therefore be deemed indefensible because contrary to original intent.

The proponents of original intent purport to rely on history. But their doctrine is bad history and worse constitutional law. The lessons of history are not learned by looking at a 200-year-old text, reading some fragments of debate in 1787, and "applying" that verbal analysis to our time as if it were a title deed describing the boundaries of a lot. John Marshall taught in the earliest days that "it is a constitution [the Court is] expounding."22/ He meant, as we all know, that the great text must be understood and adapted to serve a living nation, and that its provisions must not be read with narrow literal-mindedness. Whatever "an establishment of religion" or "due process" or "equal protection" meant when the words were first inscribed, this sort of phrase, in Holmes's words, "is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."23/ The words of the Constitution are thus informed by the experiences of the intervening decades and centuries. History, and a sound

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22/ McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579, 602 (1819) (emphasis added).

23/ Towne v. Eisner, 245 U.S. 418, 425 (1918).

understanding of original intent, must include, among volumes of events, that the slaves were partially freed in 1864 in a process that continues; that women are approaching full equality as the Senate sits today; that Hitler and the Holocaust have left their deep scars on our memories; that the races and languages and religions, or non-religions, of Americans are much different from what they once were.

Taken with the consistent pattern of his recorded views, Judge Bork's enrollment of himself as an "originalist" bodes ill for his treatment of the Bill of Rights. Its practical meaning, especially in light of his other specific utterances, is that he may be expected to serve the Administration's agenda for shrinking the rights the Supreme Court has sustained.

Theory and practice

A word, finally, on Judge Bork's constant insistence that rights may be recognized -- that a Supreme Court decision can be "legitimate" -- only if the Court is able to state a "valid theory," tightly logical and predictably "neutral" across the board, to sustain the result.24/ The ideal is one to strive for. But it has some limits and qualifications that are relevant in appraising a candidate for the Supreme Court.

24/ See Neutral Principles, supra, 47 Ind. L. J. at 3, 6, 8, 18-20.

First of all, in the nature of our common law process, the ideal is rarely if every fully realized. The theories are always being modified, fine-tuned, revised, and reshaped; the Supreme Court, though unique in many respects, must also proceed case by case, as Justice Powell and others have noted. The demand for an airtight theory as a precondition to judgment is in this important sense unrealistic. When former Professors Frankfurter and Douglas joined in Shelley v. Kraemer, 334 U.S. 1 (1948), they were undoubtedly no less aware than Professor Bork and others that the principles there stated would need restatement and modification over time. But they saw and adjudged that judicial enforcement of restrictive covenants, walling off whole areas of living space against black people, could no longer subsist with what the equal protection clause had come to mean by that time. Their trained judicial understanding of sound constitutional law took precedence over the urge to have a logically unassailable essay for the opinion.

Professors other than Bork also saw the logical problem, but also saw the paramount constitutional values. One such scholar, the distinguished Professor Louis Henkin, responded by the constructive effort to show how the opinion, or the next opinion, could be better reasoned to reach the obviously sound result.25/ For Judge Bork, an imperfect theory killed the claim of right.

25/ Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962).

A second point about theory is that the great bulk of the Supreme Court's business, perhaps the most fundamental aspect of its business, is done without any published or fully articulated statements of theory of any kind. As against the 150 or so opinions written in each recent year, each Justice votes 4,000 or more times a year, mainly on petitions for certiorari and statements as to jurisdiction of appeals. These votes selecting what the Court will hear on the merits are critical steps in outlining the directions of the Court's attention and as a consequence the course of its decisions. One must know realistically that the votes are taken without theoretical elaboration, and undoubtedly on theories, often unstated, that vary from one Justice to another.

In this uncounted accumulation of cases the general outlook and philosophy of each Justice may be even more significant than it is in the cases decided by formal opinion. One hopes that the Justices proceed on more than hunch and inchoate feel. One knows, however, that their overall place on the judicial spectrum -- call it "liberal" or "conservative" or whatever -- adds up to a kind of predisposition that is vital for the vast volume of business.

This touches a central theme germane to the closely contested nomination now under consideration. There is a broad middle range of talented legal professionals -- practicing

lawyers, judges, academics -- from which most Justices of the Supreme Court have been chosen, at least in recent decades. Especially in this century, the Senate has tended to approve the President's nominees, whether or not the White House and the Senate were controlled by the same party. Confrontations have arisen when the President has named someone perceived -- at least by some -- to be starkly and predictably outside the mainstream. In selecting Judge Bork, President Reagan has made such a choice, with the evident purpose of dismantling or diminishing keystone portions of constitutional law applying the Bill of Rights.

Believing this choice to be antithetical to values that give the United States its highest claim to leadership of the free world, the American Jewish Congress urges respectfully that the Senate withhold its advice and consent.

TESTIMONY OF THE AMERICAN MEDICAL STUDENT ASSOCIATION SUBMITTED TO THE SENATE JUDICIARY COMMITTEE HEARINGS ON THE CONFIRMATION OF ROBERT BORK TO THE SUPREME COURT

P. Preston Reynolds, MD, PhD
National President

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September 30, 1987

TESTIMONY OF THE AMERICAN MEDICAL STUDENT ASSOCIATION

SUBMITTED TO THE

SENATE JUDICIARY COMMITTEE

HEARINGS ON THE CONFIRMATION OF ROBERT BORK

TO THE SUPREME COURT

Mr. Chairman and members of the Committee:

Medical organizations do not often take a stand on nominees to the Supreme Court. The American Medical Student Association, however, is compelled to take a stand on President Reagan's nomination of Robert Bork to the Supreme Court because of the impact Judge Bork's rulings from the High Bench would have on the practice of medicine well into the future.

Specifically, Judge Bork's rulings from the High Bench would affect occupational medicine, Medicare and Medicaid, the doctrine of informed consent, and reproductive health care, including the availability of birth control and abortion. In his writings, speeches and judicial opinions, Robert Bork has demonstrated consistent hostility to the rights of the individual and the right to privacy. We are concerned about what effect his decisions will have on our practice of medicine, and what his decisions will mean to the well-being of our patients.

We have researched this issue carefully and followed these hearings with care. There are many reasons to oppose this nomination, access to the courts for the people of this country and the Congress not among the least of these, but we will focus on medically relevant arguments in this presentation.

There are several reasons that physicians should oppose the nomination of Robert Bork. First, Judge Bork's position on privacy undermines the physician-patient relationship in a fundamental way. Privacy, autonomy, and self-determination underlie the doctrine of informed consent. Bork's rejection of the right to privacy would permit the state to interfere with medical decision making and to interpose itself between the doctor and patient.

In Griswold v. Conn. (1965), the Supreme Court, citing the right to privacy, struck down a Connecticut statute making it a crime for anyone (including married couples) to use contraceptives. In 1971 and again in 1984, Bork disagreed with this ruling. He held that there was no "supportable method of constitutional reasoning" to back up the decision. In his testimony, Senator Biden asked Justice Bork very specifically if he felt the Constitution guaranteed a "marital right to privacy". The Justice replied "I don't know". He implied that he had not studied the Constitution in that light. This statement is unacceptable and unbelievable from a man who has so vocally criticized the Griswold v. Conn. case.

A more recent Supreme Court decision, Roe v. Wade (1973) struck down state laws which made abortion illegal. The Court ruled that a woman's decision to have an abortion is protected by a constitutional right to privacy. Bork called this "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of the state legislative authority".

In his testimony, Robert Bork claimed that he would not necessarily seek to overrule these, or any other Supreme Court precedents. That is fine, now we have the right to buy contraceptives and may continue to have the right to seek abortions in the first trimester of pregancy. What will happen when the next case comes up? What will happen if schools are sued for using condoms in AIDS prevention education? What will happen if my patient sues for the right to die or the right to refuse treatment? These areas are not yet settled in the courts, but will be. It is not dealt with in the Constitution. How would Robert Bork rule from the High Bench? Will he set aside his judicial restraint philosophy as he claims he will in examining past precedents? Or, consistent with his philosophy, will he rule that this is an area for state's jurisdiction, leading to the situation where health care availability and patient rights are dependent upon the state in which one lives. This lack of uniformity and perhaps discriminatory application of health care services is unacceptable.

Second, Bork's record clearly shows his opposition to the individual's rights. The 14th Amendment guarantees equal protection under the law for all citizens. On numerous occasions Bork has criticized the Supreme Court's "liberal" interpretation of this statement. His criticisms of Supreme Court cases as well as his own decisions on the district court indicate that he does not think homosexuals, habitual

criminals, people who don't speak English, illegitimate children, the illiterate, and women should be guaranteed equal protection. Robert Bork claimes that women have nothing to fear from him, but our concerns are not allayed by this statement and his claims that he will not overturn precedent.

With this obvious bias against the individual's rights and the right to privacy, physicians must question how Bork will rule on issues where the government threatens to intervene in doctor-patient's right to decide appropriate treatment (as in "Baby Doe"), and when AIDS patients have been denied access to care.

Third, Robert Bork has stated a readiness to overturn Supreme Court rulings with which he disagrees. If Roe v. Wade is overturned, the doctor will be put once again in the position of having to decide if a woman is legally entitled to an abortion relative to the medical indications. As physicians we are not trained in legal reasoning and yet increasingly, we may be asked to think in those terms--not what is best for the patient, but what will keep us from getting sued.

Fourth, analysis of Judge Bork's circuit court decisions has shown that his performance is not explained by the consistent application of judicial restraint or any other judicial philosophy. Instead, in split cases, Judge Bork's vote was predictable with almost complete accuracy simply by identifying the parties in the case. Where the government was involved, Bork voted against consumers, environmental groups and workers almost 100 percent of the time. When business was a party, he voted against the government and the individual in every split case.

For-profit medicine continues to grow. With Judge Bork's bias toward business, we quesion how he will rule when patients sue for the right to the most appropriate, not the least expensive care. One must ask how some of the medical organizations would fare in their attempts to assess the clinical value of a specific medical technology if sued by industry for publishing data indicating inappropriate use of that technology.

In his testimony before this body, Robert Bork tried to present himself as a moderate. He tried to convince us that he would not try to overrule the Supreme Court precedents that he has criticized so soundly. He has not convinced us. Now more that ever he seems a man unpredictable and

unwilling to take the necessary roll in interpreting the Constitution that we as Americans and physicians have come to expect and need of our Supreme Court judges.

As you decide how to vote on this nomination, I urge you to keep the privacy of your relationship with your own physician in mind. Imagine what it would be like if that right to privacy were not available, or worse yet were available to only a privileged few.

Thank you.

Testimony of

JOSEPH L. RAUH, Jr.

On Behalf Of

AMERICANS FOR DEMOCRATIC ACTION

On The

Nominiation of Robert Bork

SENATE JUDICIARY COMMITTEE

October, 1987

AMERICANS FOR DEMOCRATIC ACTION
Rep. Ted Weiss, President
Marc A. Pearl, National Director
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Mr. Chairman, members of the Committee, I am Joseph L. Rauh, Jr., a founder, former national chairman, and presently a national vice president of Americans for Democratic Action. I have appeared before this Committee many times on behalf of the ADA and also on behalf of the Leadership Conference on Civil Rights, of which I am counsel. No earlier appearance has dealt with subjects more important to the welfare of the nation than the issue before the Committee today.

The ADA Board on August 1, 1987 voted unanimously to oppose the confirmation of Robert Bork as Associate Justice of the Supreme Court. We believe the record of Judge Bork -- his opinions, writings, lectures, and public statements -- makes clear that he will try and, in view of the present delicate balance of the Court, may largely succeed in turning back the clock on the constitutional rights for which ADA has so valiantly struggled during its forty years of existence.

Further by way of introduction to my testimony, let me relate a little personal history that may help explain the depth of my feeling on the question of the Bork nomination.

I was a student of Professor Felix Frankfurter at the Harvard Law School in the early thirties, his first law clerk when he joined the Supreme Court in 1939, and his friend and surrogate son until the day he died. He applied judicial restraint even-handedly across the full range of issues before him and it is a blasphemy on Felix Frankfurter to argue, as the White House does in its briefing book for Senators and elsewhere, that Robert Bork is cut from the same mold. Bork's "judicial restraint" is a myth, a misleading cover for upholding governmental actions with which he agrees and upsetting those with which he disagrees. The 200th Anniversary of the Constitution this month is hardly the time for the confirmation of such a Supreme Court Justice with all that would mean in the loss of constitutional rights for our citizens.

There are three separate and independent grounds for rejecting the Bork nomination:

I. He will make every effort toward, and may largely succeed

in, turning back the clock on widely-accepted constitutional rights.

II. He talks the language of "judicial restraint" while deceptively practicing blatant activism in support of a far-right ideology. He is the judicial restraint emperor with no clothes on.

III. His discharge of Watergate Special Prosecutor Archibald Cox was unfair and illegal and his version of the event misstates the facts.

Each of these three grounds, as we shall see, are more than sufficient to disqualify Robert Bork for a place on the highest court of the land. Taken together they make a stronger case for his rejection than was made against almost all of the nominees turned down by the Senate in the past 200 years. And I say this having helped build the case against Judges Haynsworth and Carwell who were both turned down by the Senate. Future generations may wonder in disbelief how a man with Bork's record was ever nominated for the Supreme Court.

I mentioned the Haynsworth and Carswell rejections. During Haynsworth's confirmation hearings, the civil rights groups opposing him were threatened with "somebody worse" just as we are being threatened today. But such threats fall on deaf ears. When President Nixon carried out the somebody-worse threat with the Carswell nomination, he was rejected, too. History is on our side.

I

CONFIRMATION SHOULD BE DENIED BECAUSE THE NOMINEE DENOUNCES WIDELY ACCEPTED CONSTITUTIONAL RIGHTS.

The propriety of the Senate considering the votes a Supreme Court nominee will likely cast on important constitutional questions and the decisions he may write on those questions would no longer appear to be in contention. Indeed, Minority Leader Dole gave the show away on this point when he told a meeting of prosecutors they should support Bork because he would help them get rid of the exclusionary rule. Actually, the President took the same tack with a promise to district attorneys and police officials that Bork would not "coddle criminals." Certainly if

the Administration can try and sell Bork to the Senate on what he's going to do on particular crime issues, his opponents may, with equal propriety, ask the Senate to reject him because of what he's going to do on civil rights, privacy, speech, church and state and so forth. Incidentally, neither Bork nor the White House gave the slightest indication that Bork would be equally tough on the current wave of corporate crime.

Both Republican and Democratic Committee members demonstrated by their questioning that they deemed Bork's past positions and judicial philosophy of prime importance. Bork's views on constitutional issues became even more important because he has made it clear that he will feel free to overrule decisions he doesn't agree with. Consider just a few of his public statements:

"Since the legislature can do nothing about the interpretation of the Constitution given by a court, the court ought to be always open to rethink constitutional problems."

"Constitutional doctrines should continually be checked not just against words in prior opinions but against basic constitutional philosophy."

"Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy."

"I don't think that in the field of constitutional law, precedent is all that important."

Prophetically, at his own confirmation hearing back in 1982, Bork stated that "the only cure for a court that oversteps its bounds that I know of is the appointment power." The obvious corollary, of course, is that the only cure for an appointment that, contrary to the Senate's views, would reverse decades of constitutional progress is for the Senate to reject the nominee under its "advise and consent" power.

Bork's views on the great constitutional issues of the day are not in doubt. Both his opponents and supporters basically agree on what he will do on the Court. His right-wing think tank

worshipers happily contend that "We have the opportunity now to roll back 30 years of social and political activism by the Supreme Court." Mr. Right-Wing himself, Richard Viguerie, boasts that we "have waited over thirty years for this." Human Events, Jerry Falwell, even the White House political director, chimed in on the refrain. Bork's opponents ask only that the Senate take Bork's supporters at their word and decide if they want the existing balance on the Court uprooted and decisions of the last four decades overturned.

Bork's record on the great constitutional issues of the day reads like a bugle call for retreat from the rights of individuals to the unfettered power of government. He has called the Bill of Rights "a hastily drafted document on which little thought was expended" and has shown over and over again his disdain for the rights guaranteed therein. Look at the record:

1942. In Skinner v. Oklahoma, 316 U.S. 535, the Court invalidated a statute providing for the involuntary sterilization of criminals. Bork found this "improper and intellectually empty..."

1948. Shelley v. Kraemer, 334 U.S. 1, an unanimous decision written by a conservative Southern Chief Justice barring courts from enforcing racial restrictive covenants in real estate deeds, was "insupportable" to Bork.

1962. In Baker v. Carr, 369 U.S. 86, and Reynolds v. Sims, 377 U.S. 533 (1964), the Court equalized citizen voting power by its one-man, one vote formula. For Bork, this was "invented" by the Court contrary to constitutional text and history; "Chief Justice Warren's opinions in this series of cases," he declared, "are remarkable for their inability to muster a single respectable supporting argument."

1963. Bork opposed the public accommodations provisions of the then pending Civil Rights bill, preferring the "liberty" of the white proprietor to operate a racist establishment to the rights of the black citizen to live in dignity.

1964. Bork added the employment practices provisions of the still pending Civil Rights bill to his list of "no-nos", stating that "it is extraordinary that government should regulate the

associations of private persons."

1965. In Griswold v. Connecticut, 381 U.S. 479, the Court banned the state's efforts to prevent married couples from using contraceptives. Bork found this "unprincipled" and without any "supportable method of constitutional reasoning underlying it."

1966. Katzenbach v. Morgan, 348 U.S. 641, upheld the Voting Rights Act's partial ban on literacy tests. In testimony before a Senate Subcommittee in 1981, Bork called this decision and a later ban on literacy tests, "very bad, indeed pernicious, constitutional law."

1966. Harper v. Virginia Board of Elections, 383 U.S. 663, held the state's poll tax unconstitutional. At Bork's Solicitor General confirmation hearings, he said "it was a very small poll tax," "was not discriminatory," and was "wrongly decided."

1967. Reitman v. Mulkey, 387 U.S. 369, upheld California's open housing laws against a hostile referendum. Bork criticized the opinion, saying that it could not be "fairly drawn from the 14th Amendment."

1972. Before the Senate Education Subcommittee, Bork supported legislation withdrawing jurisdiction from the Supreme Court to order vital school desegregation remedies, while practically the entire academic community attacked this position.

1973. Roe v. Wade, 410 U.S. 113, upheld the constitutional right of a woman to choose the option of abortion. In his 1981 testimony on the Human Life Bill, Bork called this decision "unconstitutional," "a serious and wholly unjustifiable judicial usurpation of state legislative authority."

1976. As Solicitor General, Bork sought to file a brief against the remedies in the Boston School case, but was overruled by Edward Levi, the conservative Attorney General in the Ford Administration.

1976. Hills v. Gautreaux, 425 U.S. 284, upheld fair housing remedies for poor blacks over the opposition of Solicitor General Bork.

1978. University of California Regents v. Bakke, 438 U.S. 265, gave support, albeit limited, to the principles of affirmative

action. Bork, with heavy sarcasm, wrote that "as constitutional argument, it [the decision] leaves you hungry an hour later" and "must be seen as an uneasy compromise resting upon no constitutional footing of its own."

1984. As Judge, Bork wrote the decision in Dronenburg v. Zech, 741 F. 2d. 1388, 1392, validating the Navy's dismissal of servicemen for homosexual behavior. For him the right of privacy was "no more than a perception..."

1986. Again as Judge, Bork voted for the ban on protests near a foreign embassy (Finzer v. Barry, 798 F. 2d 1450) and the State Department's right to bar the entry of controversial foreign speakers. Abourezk v. Reagan, 785 F 2d 1043.

Robert Bork's generalizations on constitutional questions are as anti-rights as his views on particular cases. For him the First Amendment covers only "political" speech or moral and scientific speech relating thereto (and this latter only after widespread criticism of his original limitation to "political" speech). For him the establishment clause bars only the creation of a national church or preferential treatment of one religion over another; this is not only contrary to clear "original intent," but would end the historic wall of separation between Church and State. For him the 14th Amendment whose architects he says "had not even thought the matter through" and which he further denigrates with the appellation "equal gratification" clause, only prohibits governmental discrimination "along racial lines" and leaves all other forms of discrimination, including that against women, out in the cold. All of this is compounded by his almost absolute deference to the President in defiance of the doctrine of separation of powers and Congressional intent. Robert Bork's views of constitutional rights, whether on specific cases or on general constitutional questions, render him unqualified for a place on our highest court.

We cannot believe a majority of this body wants to see the rollback of rights for which Bork has so fervently pleaded. Rather we believe the majority shares the feeling of Joseph Welch, that bold spirit of the McCarthy era, that "in this lovely land of ours

there is no problem we cannot solve, no menace we cannot meet, nor is it in any sense necessary that we either surrender or impair any of our ancient, beautiful freedoms."

In his testimony at these confirmation hearings, Bork recanted, modified and/or reversed many of the positions he has taken over the years. Nor was this his first "confirmation conversion" as Senator Leahy aptly phrased it. At his 1973 hearing on the Solicitor Generalship he did an about face away from his opposition to a public accomodations law. But the shift this time was on a much broader front.

It is not necessary for the Senate to decide which is the real Bork. Certainly his earlier statements ["intellectually empty", "insupportable", "unprincipled", "unconstitutional", "unjustifiable judicial usurpation", "no constitutional footing", ect.] were made with far more vehemence and clarity than what he is saying now. Such earlier views are not easily discarded and Bork has himself only recently denied that his views had changed.

Is the old Bork or the new Bork the real Bork? No one knows for sure. But there is one thing of which we can be sure: The Senate must not take a chance that the old Bork is the real Bork and thus jeopardize decades of constitutional progress. There are plenty of qualified lawyers and judges available and there should be no gambling where the great rights in the Constitution are concerned.

Robert Bork would not have been nominated on the basis of the views he expressed at these committee hearings. He would not have been confirmed on the basis of the earlier views he expressed over the years. One who seeks nomination on one basis and confirmation on another deserves neither.

II

CONFIRMATION SHOULD BE DENIED BECAUSE THE NOMINEE DECEPTIVELY TALKS THE LANGUAGE OF "JUDICIAL RESTRAINT" AND BLATANTLY PRACTICES "JUDICIAL ACTIVISM."

Much has been written concerning the relative values of "judicial restraint" and "judicial activism." Great judges such as Felix Frankfurter have practiced the one and great judges such

as William O. Douglas have practiced the other. For myself, as for Chief Judge Sol Wachtler of New York, "There is a place for judicial restraint. But the protection of ...individual... freedoms is a uniquely judicial obligation and responsibility."

This is no place to seek to settle the argument between restraint and activism. The one unpardonable sin for a judge, I submit, is to seek to clothe judicial activism in the language of restraint and that is exactly what Bork has done. Such conduct can only unsettle the law for the past and render it unpredictable for the future. It can only produce a judge with neither principle nor fairness.

Several studies have demonstrated that Bork talks restraint and practices activism, upholding governmental action where that is the result he personally approves and upsetting governmental action where he disapproves. One of these studies, the Judicial Record of Judge Robert H. Bork by Public Citizen Litigation Group demonstrates this beyond peradventure of doubt. It's summary, based on carefully prepared tables, states that "when split cases in which Judge Bork participated during his five years on the D.C. Circuit are combined, on 48 out of 50 occasions (or 96% of the time) Judge Bork voted to deny access, voted against the claims of individuals who had sued the government, or voted in favor of the claims of business which sued the government." In 14 out of 14 cases he voted to deny standing in cases challenging executive action, many of the cases brought by public interest organizations and individuals, and even some brought by Senators. Confirmation of Judge Bork would amount to a self-denying action for it would increase the difficulty of this body to have the Supreme Court "declare the law" as Chief Justice Marshall held it should almost 200 years ago.

The 26 out of 28 cases in which Bork held for the government against individuals and public interest groups should be contrasted with the 8 out of 8 cases in which he held for business against the government. On any scale of mathematical probability, not coincidence but right-wing bias must be the explanation for such figures.

All of this is further corroborated by Bork's radical views on the anti-trust laws which, rejecting both restraint and original intent, argue for "economic efficiency" as the sole basis and intent for those laws. As Walter Adams, the anti-trust author and Michigan State professor puts it, "To picture Judge Bork as a conservative who believes in judicial restraint is madness." Bork is a "radical of the right," "a committed and articulate ideologue -- a true believer in the tenets of 19th century social Darwinism." And Charles G. Brown, West Virginia Attorney General and chairman of the antitrust committee of the National Association of Attorneys General, echoes that point of view: Bork's antitrust positions "are often inconsistent with the principles of those who drafted our antitrust laws. His confirmation would only serve to weaken the laws that were designed to safeguard our free marketplace."

Bork is thus obviously <u>not</u> in the judicial-restraint mold of Felix Frankfurter as the White House likes to portray their nominee. Rather Bork is in the mold of those four anti-Roosevelt justices -- Van Devanter, Sutherland, McReynolds and Butler -- who Frankfurter repeatedly denounced. These four, too, protected business from regulatory legislation or administrative action while permitting governmental action in violation of constitutional rights. New Deal statute after statute went down the drain at their hands while they thought nothing of the application of a Georgia insurrection statute to jail a Communist organizer. Their heritage is the 1937 Court-Packing attempt and a weakening of respect for the Court. This is the mold of Robert Bork, not Felix Frankfurter and it is a mold that will once again weaken respect for the Court.

III

CONFIRMATION SHOULD BE DENIED BECAUSE THE NOMINEE'S DISCHARGE OF WATERGATE SPECIAL PROSECUTOR ARCHIBALD COX WAS UNFAIR AND ILLEGAL AND HIS VERSION OF THE EVENT MISSTATES THE FACTS.

Archibald Cox was named Special Watergate Prosecutor by then Attorney General Richardson in 1973 with a guarantee of complete independence and removable only for extraordinary impropriety.

This was embodied in a Justice Department regulation providing that the special prosecutor "will not be removed except for extraordinary impropriety." True to this regulation and the Richardson-Justice Department understanding with Cox, Attorney General Richardson and Deputy Attorney General Ruckleshaus relinquished their posts rather than obey President Nixon's order to discharge Cox who, far from committing any extraordinary impropriety, was doing his job exceedingly well in seeking White House tapes of relevant Oval Office conversations.

Robert Bork did what his two superiors would not; he fired Cox and abolished the Special Prosecutor's office. He cited no impropriety, extraordinary or otherwise. His action violated the terms of Cox's appointment and the Justice Department's regulation. Since both the terms of the appointment and the regulation were institutional pledges as binding on Bork as upon Richardson and Ruckelshaus, it is hard to conjure up any rational basis for what Bork did and Federal Judge Gerhard Gesell ruled the firing "illegal" in a matter of weeks. Supreme Court decisions leave no doubt on this point.

Former Attorney General Richardson has indicated he supported Bork's action in discharging Cox. If so, that was an incredible breach of faith on Richardson's part. If Richardson made a pledge that Cox "wouldn't be subject to instructions that might call him off or impede his work," as Cox publicly stated the day of the massacre, it was as much an illegal breach of faith for Richardson to urge someone else to fire Cox for doing his job right as to do the firing himself. Actually, Mr. Ruckelshaus has denied that either he or Richardson urged Bork to fire Cox.

Bork told Bill Moyers on public television earlier this year that "the President has the right to discharge any member of the Executive Branch he chooses to discharge." To contend that the executive can order discharge in the face of the Justice Department's understanding with Cox and its own regulation is executive power run riot. One wonders which is worse: the unfair and illegal firing or the claim of absolute executive power to fire especially at this time when the constitutionality of the special prosecutor law is under challenge.

Probably neither the firing nor the claim of executive power is as damaging to Bork's case here as his loss of credibility in seeking to justify his actions as has been fully documented in a National Public Radio report by careful reporter Nina Tottenberg. Thus, Bork told the representative of the American Bar Association Committee investigating Bork's 1982 nomination to the federal appellat bench, confirmed by William Coleman's memorandum at the time, that after the Cox discharge he "immediately began searching for another Special Prosecutor." On the contrary, he signed an order that same Saturday night abolishing the special prosecutor's office and on October 23, three days later, he abolished the office a second time retroactively. On the Sunday between the two orders, he told Cox's two deputies and Henry Petersen, the Assistant Attorney General in charge of the Criminal Division, that the prosecutor's staff would be transferred to Justice and directed by Petersen. As against these actions there is no slightest showing that Bork ever spoke up for a new special prosecutor's office. When it finally was done on November 1st, it was obviously the result of the firestorm of public criticism and bipartisan Congressional pressure that caused the action. Finally, at these hearings, Bork admitted to Senator Metzenbaum that he had " no contemplation of a new special prosecutor until the public demanded it."

In his testimony before the Senate Judiciary Committee in 1982, Bork spoke of this Sunday, October 21st meeting. He said he told the two deputies and Petersen that "I would guarantee their independence including their right to go to Court to get the White House tapes or any other evidence they wanted." Not only do the other three participants in the Sunday meeting remember no such statement, but it is contradictory on its face to Bork's statement that the President can discharge anybody he wants. The President had just ordered the firing of Cox because he had gone to Court to get the tapes. How in heaven's name could Bork have guaranteed those present the next morning that they could do what he had fired Cox for doing. All participants in the Sunday meeting and common sense challenge the veracity of Bork's statement.

CONCLUSION

For each of the three reasons set forth above, and for all of the three reasons taken together, we urge this Committee to reject the Bork nomination. The Bill of Rights has had many defenders over the past 200 years and they are honored today on this two hundredth anniversary of the constitution. This is your time of duty to defend that great document and to keep the nation on the road to freedom and equality.

###

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TO: Senate Judiciary Committee

STATEMENT OF: Edd Doerr, Executive Director
Americans for Religious Liberty

SUBJECT: Robert H. Bork Nomination to the Supreme Court

DATE: September 30, 1987

Mr. Chairman and Members of the Committee:

Thank you for allowing us this opportunity to present the Committee with our views on the nomination of Robert H. Bork to the United States Supreme Court.

Americans for Religious Liberty is a nationwide, nonpartisan, nondenominational nonprofit educational organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state.

Having reviewed Judge Bork's extensive public speeches and record, we believe that his confirmation would not be in the best interests of our nation and would be inimical to the hard-won liberties of Americans guaranteed by the Constitution and until now reasonably well protected by the federal courts.

In this statement we will restrict ourselves to commenting only upon Judge Bork's views as they bear on religious liberty, freedom of conscience, and the constitutional guarantee of separation of church and state, though we believe that there are abundant other grounds for opposing his confirmation.

Judge Bork claims to believe that the Supreme Court should adhere as closely as possible to the "original intent" of the framers of the Constitution and Bill of Rights. Yet in a 1984 address at the University of Chicago he stated that "the first amendment was not intended to prohibit the nondiscriminatory advancement of religion." In this vitally important area of constitutional interpretation Judge Bork is clearly in disagreement with the First Amendment's framers, as has

been demonstrated by Professor John M. Swomley, president of Americans for Religious Liberty, in his 1987 book, Religious Liberty and the Secular State: The Constitutional Context, (Prometheus Books). A copy of the book is included with this statement, and additional copies can be made available to the committee upon request to our Washington office (232-6200).

Professor Swomley shows from the proceedings of the First Congress that that Congress specifically considered and then rejected proposed First Amendment language that would have permitted nondiscriminatory or nonpreferential government aid to religion, and subsequently adopted the present language, "Congress shall make no law respecting an establishment of religion,..."

Further, in the period during which the Constitution and Bill of Rights were drafted and approved, none of the states with religious establishments had British-model single or "preferential" establishments, but, rather, multiple or general "nonpreferential" establishments of the sort condemned in Madison's 1785 Memorial and Remonstrance Against Religious Assessments and outlawed in Jefferson's 1786 Virginia Bill for Establishing Religious Freedom, two documents which show better than anything else what the generation of the framers generally thought about church-state relations, as most of the justices who have served on the Court in the last fifty years have agreed. So the religious establishments which the First Amendment was intended to prohibit were not only British or pre-Jefferson Virginia single establishments but also the residual multiple or "nonpreferential" models which the framers saw about them at the close of the 1780s.

Professor Swomley also makes clear that the First Amendment was obviously intended to prohibit a power never given to Congress in the original Constitution, the power to appropriate funds or provide other preferential and nonpreferential aid to religion. It is illogical for Judge Bork or anyone else to suppose that a constitutional prohibition of a power should be construed as creating an authority for government to enact laws which benefit religion financially. Yet that is precisely what Judge Bork did in his 1985 Brookings Institution speech when he said that the Supreme Court erred in its 1985 Aguilar v. Felton ruling, which held unconstitutional the provision of publicly paid teachers to sectarian private schools, and when he said in the same speech that the Supreme Court erred in the 1962 Engel v. Vitale ruling, which held that school officials could not constitutionally prescribe or organize a state-sponsored prayer even if dissenting students were allowed to opt out.

TO: Senate Judiciary Committee
FROM: Edd Doerr, Executive Director
Americans for Religious Liberty
DATE: September 30, 1987
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Judge Bork has sharply criticized what he calls the "current rigidly secularist [Supreme Court] doctrine" and also the "excessive entanglement" test of First Amendment constitutionality which former Chief Justice Burger enunciated in 1971 in Lemon v. Kurtzman. Mr. Bork is wrong. The Supreme Court's line of establishment rulings shows no hostility to religion but rather a deep respect for religion and for individual religious liberty, which includes the right not to be taxed for the support, "nonpreferential" or otherwise, of religious institutions.

Judge Bork also called in his 1985 Brookings address for "the reintroduction of some religion into public schools and some greater religious symbolism in our public life." Since all students are currently free as individuals to pray or read religious literature in public schools, and since neutral, academic instruction about religion is permitted (and is only held back by the inability of scholars, educators, religious leaders, and the general public to agree on what ought to be taught), Mr. Bork, as his speeches make clear, seems to be interested in, and as a Supreme Court justice, would approve of government imposition of religion on students.

Judge Bork declared in a 1985 speech at Canisius College that "The Bill of Rights is itself a way of privatizing some aspects of morality," and in another address that "the enforced privatization of morality deprives most individuals of freedom." The majority "freedom" of which Mr. Bork spoke was defined by him in a 1985 West Point speech as the "right, found in the Constitution [sic!], of the rest of us to legislate about our ... moral environment." This view, we submit, is entirely at variance with the Madisonian/Jeffersonian thrust of the Constitution and Bill of Rights. What Mr. Bork seems not to comprehend is that, according to the Declaration of Independence, the purpose of government is to protect the equal unalienable rights of the people, not to subject their rights of conscience to "moral majority" legislative control.

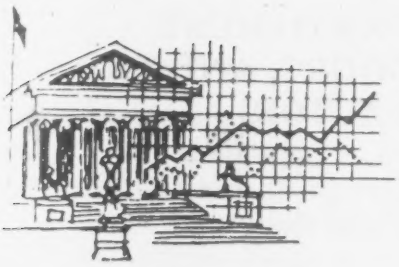
In his speeches Mr. Bork harps on the notion that "the major freedom of our kind of society is the freedom [of majorities or pluralities] to have a public morality." He demonstrates this anti-libertarian and "moral majoritarian" penchant in his repeated assertions that there is no right to privacy guaranteed by the Constitution, a right which is, however, implicit in the Ninth, Fourteenth, and other amendments, and which has been held by the Supreme Court to cover the right of married couples to practice birth control, the right of people of different races to marry, and the right of women to decide whether or not to continue problem pregnancies. His moral majori-

tarianism has even led him to brand as "wrongly decided" the Supreme Court rulings in 1922 in Meyer v. Nebraska, which upheld the "liberty" of parents to teach their children a foreign language, and in 1925 in Pierce v. Society of Sisters, the "Magna Carta" of private schools overturning an Oregon law which denied parents the right to educate their children in religious or other private schools.

In the area of religious liberty, freedom of conscience, and church-state relations, Judge Bork strongly holds views which, if they became Supreme Court doctrine, would have devastating effects upon the most basic and cherished rights of Americans. And since the eight remaining members of the Court are evenly split between strong supporters of church-state separation and religious liberty, on the one hand, and, on the other, justices who are in varying degrees unfriendly to these important constitutional values, whoever fills the Supreme Court vacancy will profoundly affect the basic freedoms of Americans until well into the next century.

We urge in the strongest possible way, then, that the Senate reject the nomination of Robert Bork.

We also suggest that the Senate exercise its constitutional duty to "advise" the President to submit a new nomination acceptable to the vast majority of Americans who, as opinion polls and referenda have repeatedly shown, strongly support religious liberty, freedom of conscience, and the Madisonian/Jeffersonian principle of separation of church and state.



ANTITRUST LAW & ECONOMICS
Review

Charles E. Mueller, *Editor-in-Chief*
Beach P.O. Box 3632
Vero Beach, Florida 32960

August 13, 1987

The Hon. Edward M. Kennedy
The United States Senate
Washington, DC 20510

Dear Senator Kennedy:

Knowing of your interest in antitrust over the years, I'm enclosing a page-proof copy of our editorial in this Review's forthcoming Vol. 19, No. 1, on the subject of Judge Bork's confirmation to the Supreme Court, along with a similar copy of a brief comment on that question by an economic scholar, Dr. Pauline Fox, appearing in that same issue.

The point of both is a simple one: We think Judge Bork's confirmation will upset the Court's current balance on antitrust, tilting it over the line in favor of great industrial consolidations that are likely to do great damage to the country's domestic and thus its international competitiveness well into the 21st century.

We know of no measure by which to compare the probable costs of Judge Bork's sociology on the Supreme Court to his likely economic costs to the nation there (and their sociological effects) but those economic debits will almost surely be very large, particularly in the antitrust area. On the basis of recent surveys (see this Review, Vol. 18, No. 2, pp. 84-92), our estimate is that something on the order of 85% to 90% of the country's professional economists would oppose his confirmation.

Sincerely,

Charles E. Mueller
Editor

Enclosure

cc: The Hon. Joseph R. Biden, Jr.
The Hon. Howard M. Metzenbaum

FOREWORD: ANTITRUST, THE SUPREME COURT, AND THE BORK FACTOR

Capture of the Court

The most important antitrust event of 1987—and indeed of perhaps the remainder of this century—is the appointment of Judge Bork to the Supreme Court, an action that seems likely to result in antitrust changes of truly tidal proportions. The 4th Reagan appointee to the Court—following Justice Sandra Day O'Connor, Chief Justice William Rehnquist, and Justice Antonin Scalia—he will undoubtedly, by reason of long background in this specialized field and reportedly strong personal qualities, become the Court's antitrust expert, the voice that will tilt the balance in that area for all but the most committed of its minority members. Chicago's fondest dream has now been realized: There's at last a Reagan-Chicago Court in command of federal antitrust policy, with the power to direct it where it will, save only for the (at present quite unlikely) possible intervention of Congress. What will the results be in the world of antitrust? A number of interesting hypotheses will almost surely be tested.

'Second Thoughts'?

• *Justices 'Mature' On the Court.* This notion holds that the combination of a lifetime appointment and a gradually-developing sense of the awesomeness of the office's responsibilities to the nation has a dramatically sobering effect on even the most ideologically-inclined of appointees, thus leading them to an eventual "independent" stance that is

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often a sore disappointment to the president who picked them and to an abandonment of the ideologically-partisan agenda that was the basis of their initial selection. The implication is of course that a Justice Bork, for example—surveying the antitrust scene from this new perspective—might have second thoughts on the matter and become, say, a "moderate" in that area, discovering virtues in the various federal antitrust statutes and their vigorous enforcement that had previously escaped him in his earlier scholarly work and his ascent up the judicial ladder.

Up to Congress

• *Conservatives 'Respect Precedent.'* Those of the liberal political persuasion are said to be "activist" in their social orientation—eager to change the existing laws, interpretations of laws, and other institutions of public life—while conservatives are respectful of what has gone before, of the laws Congress has passed, for example, and of the precedents that have been established under them by the courts over the years. This thesis would imply that Justice Bork, while not personally persuaded of the economic and social merits of, for example, the *Alcoa, Brown Shoe, Von's Grocery, Clorox, Utah Pie,* and other such antitrust precedents, would put aside his personal convictions and say, if the law here is to be changed, it's up to Congress to do it, not up to me or this Court.

Political 'Tides'

• *The Supreme Court Reads the Election Returns.* The hypothesis here is of course grounded in the familiar "political-cycle" theory—the notion that whichever political party is in power at the moment will either abuse it, over-promise, or produce massive boredom, leading the voters to oscillate on a fairly regular basis between "liberal" and "conservative"

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leanings—plus the idea that the members of the Supreme Court, notwithstanding their lifetime appointments and presumed Olympian detachment from the lowly political scene, nonetheless read the daily newspapers and trim their own sails when it becomes unavoidably plain that public sentiment is running strongly enough against them to get their decisions reversed in Congress, not to mention routinely and embarrassingly skewered in the national press. The implication here would presumably be that a Bork-directed Supreme Court antitrust agenda would eventually clash with a rising political tide in the other direction and, concluding that discretion is the better part of valor, he and his conservative colleagues on the Court would suddenly discover some previously-unnoticed virtues of antitrust. An essential feature of this particular hypothesis is said to be its inevitability: One has only to wait.

Under Prior 'Restraint'

We don't find any of these arguments particularly persuasive in general and even less so in the case of Judge Bork, a man of mature age (60 years old) whose views on antitrust, far from being of recent or casual vintage, are the product of decades of full-time development and active advocacy on their behalf. He is presumably aware that these antitrust views of his are those of a distinct minority of the economics profession—perhaps no more than 10% to 15% of its total membership as indicated by recent surveys (see *Review*, '86, No. 2, pp. 84-92)—and has, over the years, almost certainly encountered (and presumably rejected) every argument against them. To suggest that ideas and opinions acquired so deliberately and systematically and expressed so forcefully over so long a period of time are held with less than deep conviction and will yield to some new sense of "independence" is to imply that he has heretofore been under some kind of intellectual restraint that has precluded him from expressing his "true" beliefs on the subject, a notion that strains our credulity.

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'Where the Heat Is the Hottest'

We have a similar problem with the "election-returns" hypothesis, the idea that his views could be altered by even the most overwhelming expressions of the *vox populi*. He is, as noted, long-accustomed to being in a 10% or so minority in the economics profession and, having successfully resisted the evidence and arguments of that 90% expert majority, would almost surely have no difficulty in standing firm against the small electoral majority-margins that are typical in national political elections, particularly in view of the doubts that—as a professional in the antitrust field—he will presumably harbor as to the intellectual and scientific qualifications of that voting majority to reach an informed opinion on those issues. Perhaps more importantly here, antitrust—despite its pivotal role in maintaining the country's domestic and thus international competitiveness—seems unlikely to approach the top of the voter-indignation list and thus become a high-visibility factor in any such hypothetical electoral revolt. Even if one assumes, then, that Judge Bork might bend to the political winds on, say, the constitutional issues where the political heat is the hottest—abortion, criminal rights, and so on—this hardly suggests that he or his fellow members of the now-conservative Court majority will do so on antitrust, an area where no strong public-opinion pressures will presumably be felt.

'Routinely Chicagoan'

The "respect-for-precedent" argument strikes us as equally inconsistent not only with everything we've observed of human nature over the years—including its operation among decisionmakers, judicial and otherwise—but of the country's experience with judges of all kinds, particularly the "conservative" ones of recent years. We don't know how many antitrust decisions Judge Bork has written or otherwise supported during his tenure with the District of Columbia

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Circuit Court of Appeals—we understand that this Circuit handles a relatively small number of such cases—but we'd be greatly surprised if they were anything less than routinely Chicagoan in their thrust and result, i.e., if any of them found for an antitrust plaintiff except in a particularly-raw and petty collusion case or perhaps in one involving some kind of public regulation.

'Upset Any Precedent'

We know of no one who doubts, for example, the "activist" role that has been taken by two of the more notable Chicago judges on the 7th Circuit Court of Appeals, Judge Posner—reportedly the second-highest on Reagan's list of potential nominees to the Supreme Court—and Judge Easterbrook. "Judge Posner," as one economic scholar has put it, "applies economic analysis in all areas of law, antitrust, torts, contracts, family law, constitutional law, and so on... No area of the law is beyond the reach of Posnerian economics. In one decision he made a cost-benefit analysis of a high-school rule prohibiting a student from playing basketball wearing a yarmulke (a cap worn by some Jews) pinned on with a bobby pin, his conclusion being that the safety costs outweighed the value of the student's religious beliefs... While President Reagan has pledged to appoint judges who practice 'judicial restraint,' his Chicago-school appointees are actually radical activists, *prepared to upset any precedent* that diverges from their view of the economic world." Dr. Willard F. Mueller, "A New Attack On Antitrust: The Chicago Case," *Review*, '86, No. 1, pp. 50-51. Professor Philip Kurland of the University of Chicago Law School has noted that "judges are being appointed in the expectation that they will *rewrite laws and the Constitution* to the administration's liking. Reagan's judges are activists in support of conservative dogma." Id., pp. 51-52 (emphasis added).

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'Key-Precedent' Test

This "rewrite-the-laws" charge should in principle be a relatively simple matter to test in the Senate Judiciary Committee's hearings on the confirmation of Judge Bork to the Supreme Court. First, he could be asked whether—as a conservative and thus an alleged respecter of the will of Congress as expressed in its written laws as they now stand—he will defer to and support in all his future opinions and counsel to the Court that expressed will of Congress as set out in the various antitrust statutes as written, particularly the Sherman and Clayton Acts. If he gives an ambiguous or equivocal answer to that question, he could then be taken through each of the key provisions of those two statutes and asked to specify which he will give his support to and which, if any, he will feel it his public duty to oppose on the Court. Secondly, his attention could be called to the less-than-restrained record of his fellow Chicago judges such as Posner and Easterbrook of the 7th Circuit (Chicago) and a series of questions posed as to whether he endorses their apparently principled and routine overturning of precedent on the basis of Chicago economic theory, both generally and in regard to antitrust in particular. Thirdly, and perhaps most importantly, Judge Bork could be asked by the Judiciary Committee as to whether he will support, as a member of the Supreme Court, a key group of its precedent-decisions, those that form the bedrock of American antitrust in each of its vital areas. (There should be no great difficulty in making up a rather short list of the decisions of the Court over the past century that—each in its own area—makes up the central edifice of antitrust in our country.)

Dry Up the Cases?

What will be the effects of this new Reagan-Chicago Supreme Court in antitrust? First, it would seem logical to expect an almost immediate and dramatic reduction in

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the number of cases in the federal courts. There has already been a sharp post-'81 decline in the activity of the two federal antitrust agencies, Justice and the FTC, and the number of private cases filed in the federal courts, as we've mentioned earlier, peaked at some 1,600 filed in 1977 and had dropped to a recent low of just over 1,000 filed in 1985. Both of these trends should now accelerate sharply: The Reagan people at the two agencies—armed with this new legal and moral support from the Supreme Court—will presumably be emboldened to step up their program of nonenforcement and private plaintiffs, confronting hereafter the virtually-certain reversal by that Court of any lower-court victories they might win, will have a powerful incentive to avoid the costs of antitrust litigation that promises only ultimate defeat.

Kill the Settlements?

Similarly, we would expect that there will be an immediate and equally dramatic shrinkage in the number of private cases that are currently pending. Again, those plaintiffs, facing the overwhelming odds against a sustaining of their lower-court victories in the Supreme Court, will have a powerful incentive to settle not just for the usual single-damage amount even after they've won a jury verdict (which, if sustained on appeal, would give them treble that figure) but a fraction of that, for virtually anything they can get. Antitrust defendants, on the other hand—knowing that they now have the Supreme Court on their side—will have every reason to drive a very hard bargain indeed, if not to simply refuse to even discuss settlement in the expectation of getting the law itself changed in their favor on appeal, a change that could benefit their nationwide operations far beyond the confines of some single pending case they might have. We should be seeing quite shortly, then, a sharp increase in the number of appeals as the country's major corporations begin a systematic testing of the new legal waters, a sustained and deliberate effort to get as many of

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the more inconvenient precedents overruled as promptly and efficiently as possible.

Conversion By the Pen

We would also anticipate that there will be a quite immediate jump in the number of pending cases in which the district (trial) judge summarily disposes of them by overturning jury verdicts, granting the defendants directed verdicts, and so on. It is hardly a secret that the lower-court judges are not, in the main, enthusiastic about getting reversed by a higher court and one can rest assured that they and their clerks are now busily reading Judge Bork's various antitrust writings (see, e.g., the Comment by Dr. Pauline Fox, below, p. 13) along with those of other prominent Chicago-school authors. Such Chicago judges as Posner and Easterbrook of the 7th Circuit will henceforth have a new stature, one that recognizes them as more or less oracles of right principles of law as they will be seen by the Supreme Court itself, as proxies or spokesmen for how that high Court can similarly be expected to rule in view of their shared commitment with it to the known and unwavering Chicago view of antitrust issues. The district-court judges, being only too aware that the appellate judges are similarly loathe to have their own decisions reversed in stinging opinions from the Supreme Court, will presumably be expecting their individual court of appeals to promptly adopt the Chicago view, with the result that—aside from those relatively few maverick judges who are indifferent to or even relish the intellectual adrenalin of reversal—both of the lower tiers of the country's some 1,000 federal judges can be reasonably expected to undergo a swift conversion to the Chicago faith in antitrust.

Follow the Leaders

There will be another interesting factor at work here as

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well, namely, an increased stature for the teachings of Henry Manne's Miami/Emory (now George Mason) Law & Economics Center, the Chicago learning that it has provided, as we've mentioned earlier, to probably at least 400 of those judges in the 2-week resort-area seminars it has sponsored for them over the years. They will now presumably be viewing those teachings not as simply education in economic principles but as the true intellectual basis of the law itself, as more or less legal "gospel" that enjoys the approval of the Supreme Court and hence must hereafter be treated as giving mandatory rather than optional or advisory answers to antitrust questions. Similarly, the status and thus influence of the other 300 or more judges appointed by Reagan so far will now be considerably higher in the eyes of their brethren on the bench, the presumption being that—chosen because they presumably embody the same principles as Judge Bork and his Reagan Supreme Court colleagues—their views are more closely attuned than others' to those that will be guiding that Court in the future. Following their lead, then, will be reasonably perceived as not only the embracing of right thinking and sound economics but as further insurance against the reversal of one's rulings.

Takeover Green-Light?

The most dramatic effect of all, however, of Judge Bork's appointment to the Supreme Court will probably be a powerful surge in the current merger wave. There will undoubtedly be a stepped-up aggressiveness of the country's larger firms on the "conduct" side—tightened and enlarged vertical restraints, more price discrimination and predation, and so on—but corporate lawyers tend to counsel caution in areas like this for at least some moderate wait-and-see period. We would expect no such restraint, however, in the implementation of some mergers of unprecedented boldness since, unlike those behavioral practices, they can't be undone by future administrations with a less sympathetic view of bigness and

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market dominance. Mergers, as the expression goes, are like diamonds, they're forever, as is evidenced by the fact that only one has been voided after a lapse of years, the GM/Du Pont merger of some years back. Judge Bork's appointment, by sending a green-light takeover signal to the corporate world and simultaneously encouraging Justice and the FTC to become even more lenient in regard to mergers, will almost surely lead to an even more powerful consolidation movement in the country, a wave of new combinations that might well rival the one we experienced at the turn of the century.

Intellectual 'Swapping' With Europe?

There is one special irony in all this, the recent reversal of the antitrust policy positions of America and the other industrialized countries, particularly those in Europe and Japan. Among our recent visitors here in Vero Beach was Dr. H.W. de Jong of the University of Amsterdam/Netherlands (see our interview with him last time and below). Europe has historically had a laissez faire or even encouraging attitude toward monopoly while the U.S., especially in the post-war period, was big on antitrust. Now it's the other way around: Post-'81 America thinks that the secret of international "competitiveness" is to encourage domestic monopolies, while the EEC and the more successful European countries (e.g., Germany), along with Japan, for example, are working on the opposing theory, that the way a nation becomes a formidable economic competitor internationally is to first become fiercely competitive *domestically*, thus forcing the country's constituent firms to shed their monopoly/oligopoly fat, to become lean and hard, to get down their costs, innovate, and raise the quality of their products. Dr. de Jong has reminded us, for example, that Japan has a larger number of auto firms than we do (8 there at our latest count) and thinks that, if we had used antitrust to bust up GM some decades ago, America might today have an

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internationally competitive and thus viable auto industry.

'Twilight' On the 100th?

This new Reagan Court will, in all probability, last well into the 21st century and, barring some extraordinary counter-efforts by the friends of antitrust, there would seem to be little possibility that it can continue to be a significant force in terms of preserving the competitive character of the American economy. The simple fact is that Chicago, as far as antitrust is concerned, has now captured 2 of the 3 branches of the federal government—the judiciary and the executive—and probably has more supporters than its opponents in the 3rd one, the Congress, where the proantitrust professionals seem to be generally unknown and thus necessarily unheeded despite their overwhelming numerical superiority. Unless the scholars in the field are prepared to come together and persuasively inform a majority of those 535 congressmen that Chicago's anti-antitrust economics as represented by Judge Bork (a) is a minority view that commands the support of perhaps no more than 10% or so of the expert (and general) economic community and (b) is economically unsound, antitrust may well be entering its "twilight" on the eve of the 100th anniversary of the Sherman Act of 1890.

Editors

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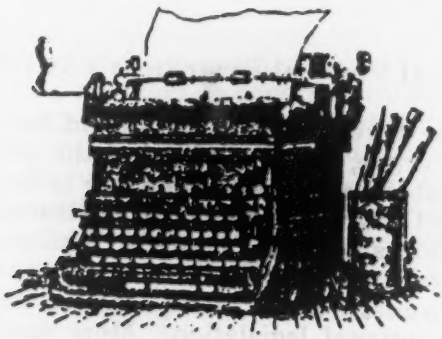
COMMENT



BORK'S 'ANTITRUST PARADOX'

'Welfare' and 'Efficiency'

The nomination of Judge Robert H. Bork to the Supreme Court has caused an unusual amount of controversy, with liberals insisting that the Senate should look carefully at his nomination and conservatives crying that he's being treated unfairly and lodging charges of crowd hysteria against those who question his probable influence and effect on the Court. Predicting how a justice will address issues in the future is of course often difficult and is even more so in the special case of antitrust where, as Bork himself has recognized, the Court has an unusual degree of latitude: "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law." Bork (quoting Judge Wyzanski), *The Antitrust Paradox*, p. 409. Fortunately for those with an interest in antitrust, Bork has made his views rather clearly known in that book, spelling out a 3-step chain of reasoning: 1st, consumer welfare is the only possible guide for judging antitrust violations; 2nd, any business activity which has the possibility of increasing business efficiency may result in an increase in consumer welfare; and 3rd—and most importantly—nonancillary price-fixing agreements, major horizontal mergers (those which leave less than 3 major competitors in an industry), and deliberate predation are the *only* antitrust violations which

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can't lead to increased efficiency. Conclusion: No other antitrust violations should be prosecuted.

'All Vertical Restraints Lawful'

Each of these 3 premises can, and should, be questioned. One can reasonably argue, for example, that the protection of small business—even at the expense of some loss of consumer welfare—was intended by Congress in its passage of the antitrust laws and that this intention should be honored. While many economists might find this concept difficult to accept, it's not the place of the Supreme Court to question the criteria Congress has used in passing otherwise constitutional legislation. More disturbing than the question of protecting small business versus consumer welfare, however, are Bork's views on the majority of antitrust violations. One of the more bizarre arguments in his *Antitrust Paradox*, for example, concerns resale-price-maintenance (RPM) agreements, which he maintains are always—without exception—in the best interests of the consumer: "All vertical restraints are beneficial to consumers and should for that reason be completely lawful." (P. 297.) Perhaps an even more bizarre conclusion is that many horizontal price-fixing and market-sharing agreements are ancillary to arrangements which result in greater efficiency and hence should be similarly legal. How long would it take for business executives to realize that, so long as an agreement is drawn up in such a way that efficiency is mentioned in the first paragraph, price fixing is fine? I have more faith in the creativity of human beings than Bork apparently has.

'Goodbye, Antitrust'

Even if the first two steps in his chain of reasoning should be accepted, the 3rd wouldn't necessarily follow. Instead of arguing that antitrust violations can reduce consumer welfare in some instances and might increase it in others, he maintains that no action should be taken if there's any *possibility* of a welfare increase from such a law violation, an apparent divergence between pursuing real increased consumer welfare and chasing a will o' the wisp chance for it. Unfortunately, most Supreme Court justices have neither the time nor the inclination to examine detailed theoretical arguments on economic issues. Instead, should Bork take his place there, it will be all too easy for the other members to turn to

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him for his interpretation of such arcane questions as the micro-economic theory of resale price maintenance. The future of anti-trust according to Bork is clear: "The law should permit agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary... to an integration of productive economic activity. It should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, 'predatory' price cutting, price discrimination, and the like. Anti-trust should have no concern with any firm size or industry structure created by internal growth or by a merger more than 10 years old." Id., p. 406.

Goodbye, antitrust.

Dr. Pauline H. Cox
Southeast Missouri State University
Cape Girardeau

BEST AVAILABLE COPY

September 29, 1987

Senator Joseph Biden
Chairman, Senate Judiciary Committee
Washington, D.C. 20410

Dear Senator Biden:

As teachers of antitrust law and as citizens, we ask that the Senate withhold its consent to the nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court. Our opposition to Judge Bork derives from a concern that Judge Bork has developed and expressed a fixed ideological view of the role of Congress and the Supreme Court in the formulation of antitrust policy. That view so conflicts with major Supreme Court antitrust decisions of the twentieth century and is so opposed to the major congressional antitrust enactments of 1914, 1936, and 1950, that we believe Judge Bork displays a closed mind, bound by preconceived and idiosyncratic economic notions.

Judge Bork's views, crystallized in his only published book, The Antitrust Paradox--A Policy at War With Itself, would eliminate most present antitrust enforcement. There would be very few challenges to horizontal mergers and joint ventures, no challenges to conglomerate combinations and virtually none to vertical mergers. Virtually all monopolies, all vertical contractual agreements (resale price maintenance, exclusive dealing contracts, and tie-in sales), all price discrimination and most boycotts would be per se legal. In short, Judge Bork offers a radical blueprint for the aggressive judicial dismemberment of almost a century of legislative and judicial antitrust policy.

Judge Bork's antitrust ideology is based on his unique view of antitrust legislative history, which we consider dubious at best, and from a preoccupation with a particular school of economic analysis that totally ignores vital economic as well as non-economic factors in antitrust policy clearly articulated in legislative history and Supreme Court case law. Judge Bork's limited writings on the federal bench are fully consistent with the extreme views in The Antitrust Paradox. In his 1986 opinion in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., Judge Bork made it perfectly clear that he would incorporate these views into antitrust law. In that decision, which closely followed the views that he had expressed as a law professor, often virtually word for word, Judge Bork concluded that several Supreme Court

decisions dating from 1941 to 1982 had either been overruled de facto or cannot mean what they literally say. These sweeping conclusions were not only gratuitous but were quite unnecessary to the decision in the case. All of this evoked a sharp concurring opinion by Chief Judge Patricia Wald who was unwilling to join in Judge Bork's confined view of antitrust law.

Judge Bork has asked to be evaluated not on his scholarship, but on his judicial decisions. But the decision in Rothery is the strongest possible evidence of the withering effect the appointment of Robert Bork would have on antitrust law. First, Rothery shows that Judge Bork will seize every opportunity to rewrite antitrust law, whether or not it is necessary to the decision in the case. Second, Rothery shows that Judge Bork will not hesitate to overrule, confine, or reinterpret a prior antitrust decision. Finally, Rothery shows that Judge Bork's prior scholarly writings are to be taken seriously, for they are in fact a close and accurate representation of his current judicial views. Can there be any doubt as to what havoc Judge Bork would inflict on established antitrust principles if he were on the Supreme Court, rather than on an inferior tribunal?

If, after a full examination of the record, the Senators conclude as we have, that Judge Bork holds views that are fundamentally opposed to the letter and spirit of the antitrust laws, they have both the authority and the responsibility to withhold consent to the nomination.

Yours very truly,

Burton C. Agata, Max Schumertz Distinguished Professor, Hofstra University School of Law
Peter Carstensen, Professor, University of Wisconsin Law School
Harry H. First, Jr., Professor, New York University School of Law
John J. Flynn, Hugh B. Brown Professor, University of Utah, College of Law
Eleanor Fox, Professor, New York University School of Law
Harry S. Gerla, Associate Professor, University of Dayton School of Law
Leonard Orland, Professor, University of Connecticut School of Law
Robert B. Pitofsky, Dean and Professor, Georgetown University Law Center
James F. Ponsoldt, Associate Professor, University of Georgia School of Law

Andrew F. Popper, Professor, American University Washington College of Law
Stephen F. Ross, Assistant Professor, University of Illinois College of Law
Louis B. Schwartz, Professor, University of California, Hastings College of the Law
Herman Schwartz, Professor, American University Washington College of Law
Kurt A. Strasser, Professor, University of Connecticut School of Law
Lawrence A. Sullivan, Earl Warren Professor of Public Law, University of California School of Law, Berleley
Lance Tibbles, Professor, Capitol University Law School
Gayl Westerman, Professor, Pace University School of Law
Gerald B. Wetlaufer, Associate Professor, University of Iowa College of Law

NOTE: Law school names are for identification purposes only and is not intended to imply a position on the Bork nomination by any law school.

ADDENDUM

Professor Peter C. Carstensen
While I strongly oppose Judge Bork's confirmation, based on the rigid, narrow and extreme policy perspectives which he has advocated as a scholar, it is also true that his scholarly work, at least in antitrust, despite its ideological content and reliance on a narrow conception of economic analysis, has contributed importantly to the public policy and scholarly analysis of antitrust law. Consequently, I greatly respect Judge Bork for his scholarly contributions to antitrust, but I am nevertheless opposed to his confirmation as a Supreme Court Justice.

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ASIAN AMERICAN BAR ASSOCIATION
OF THE GREATER BAY AREA
P.O. Box 3370
San Francisco, California 94119-3370

REPLY TO

September 15, 1987

Senator Joseph R. Biden, Jr.
Chairman Senate Judiciary Committee
224 Dirksen Building
Washington, D.C. 20510-6275

Dear Senator Biden:

The Asian American Bar Association of the Greater Bay Area opposes the confirmation of Judge Robert Bork as an Associate Justice of the United States Supreme Court.

Our opposition to Judge Bork's confirmation is based upon his repeated opposition to, and criticism of, decisions of the Supreme Court protecting civil rights. We urge you to examine closely Judge Bork's record on civil rights; in our view that record reflects an insensitivity to equal justice and a view that is extreme by any measure.

We would like to direct your attention to one example of Justice Bork's views that, if accepted, would have a devastating effect upon Asian Americans and other ethnic minority groups. In arguing that "broad areas of constitutional law ought to be reformulated," Justice Bork expressed his view in 1971 that several cases were "wrongly decided, e.g., Meyer v. Nebraska, which struck down a

statute forbidding the teaching of subjects in any language other than English" (Bork, Neutral Principles and Some First Amendment Problems (1971) 47 Indiana Law Journal 1, 11). Judge Bork apparently rejects the landmark declaration in Meyer v. Nebraska (1923) 262 U.S. 390, 401, that "the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." If, as Judge Bork urges, Meyer v. Nebraska was "wrongly decided," then states would be free to forbid the teaching in private schools of Chinese or Japanese, or indeed German, French, or Spanish as well. Fortunately, that has not been the law since the 1923 Meyer decision, was not the law when Judge Bork expressed his view in 1971, and is not the law now (Roberts v. United States Jaycees (1984) 468 U.S. 609, 618 ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. E.g., * * * Meyer v. Nebraska").

Numerous documents reviewing Judge Bork's public record have been presented to you by other organizations and we submit, clearly demonstrate that his views radically depart from the Supreme Court's

precedence upholding civil rights. Our bar association is committed to promoting equal justice for all. The Board of Directors of the Asian American Bar Association of the Greater Bay Area urges you to decline to confirm Judge Bork.

Sincerely,

Hon Chew

Hon Chew
President of the
Asian-American Bar
Association of the
Greater Bay Area

cc: Senator Alan Cranston
Senator Peter Wilson

October 2, 1987

STATEMENT REGARDING JUDGE ROBERT H. BORK

As members of the legal profession, we have a special concern for the Constitution, particularly as it provides protection for individual rights; for the Supreme Court, which is the final interpreter of the Constitution; and for the process by which the other two branches of government -- legislative and executive -- shape the third branch, and through it the substance of the Constitution.

Because of these special concerns, we have given close attention to the nomination of Judge Bork, whose role in determining the character of the Court as an institution, and thereby the course of constitutional law, could well be of critical significance.

In our scheme of government the two branches that are accountable to the electorate share responsibility for selecting those who will compose the third branch, which has life tenure and no electoral accountability. In this framework, we believe that the Senate, in considering nominations to the Supreme Court, should give important weight to the likely effect of a particular nomination on the character of the Court, and in consequence on the course of constitutional law.

There is an unusually extensive public record of Judge Bork's views on a variety of legal and constitutional issues, both before and since his appointment to the Court of Appeals. The emphatic and consistent character of those views makes it fair to assume that they would govern his votes and his opinions as an Associate Justice of the Supreme Court.

On the basis of that public record, we believe it inescapable that Judge Bork would move the Supreme Court's jurisprudence in a direction that would radically diminish constitutional protections of individual rights that have been settled for a generation or more.

-- Judge Bork's view, rejecting Supreme Court authority to the contrary, is that the Equal Protection Clause of the Fourteenth Amendment does not require equality of suffrage (in the sense of one person, one vote), or prohibit a poll tax, or prohibit discrimination on such grounds as sex, or illegitimacy of birth, or empower Congress to prohibit literacy tests as a precondition to suffrage.

-- As respects race discrimination, Judge Bork would give a much narrower application than has the Supreme Court to constitutional and statutory protections. For example, he disagrees with the Court's holdings that the Fourteenth Amendment bars judicial enforcement of racially restrictive covenants; he believes that the Amendment gives Congress no authority to remedy de facto segregation.

-- Judge Bork recognizes no constitutional right of privacy (in the sense of freedom of choice about personal matters), and thus disagrees not only with Supreme Court decisions recognizing a right of abortion, but with a line of decisions going back as far as sixty years and recognizing, among other things, a constitutional right of parents to have their children taught foreign languages, a right of parents to send their children to private schools, a right not to be compulsorily sterilized on the basis of habitual criminality, a right of married couples to use contraceptives, and (presumably) a right to read or see whatever one wishes in the privacy of one's home.

-- Judge Bork takes a much more restrictive view of the First Amendment's protection of freedom of speech than has the Supreme Court. Although he has apparently modified in some degree his earlier view that the constitution protects only political speech, and not artistic, scientific or literary expression, nonetheless he would limit the protection of the First Amendment to exclude speech advocating even non-violent violations of law, such as civil disobedience, without any requirement, such as current Supreme Court authority imposes, that the speech pose an imminent threat of illegal action. Similarly, he would exclude from constitutional protection political speech that employs offensive words.

These examples speak to views that Judge Bork publicly expressed before his testimony in the current confirmation hearings. That testimony suggested that as to some important issues his views might no longer be those he had previously expressed, and that on some other issues he might not, given the weight of precedent, vote to overturn Supreme Court decisions with which he nonetheless disagreed. We are not persuaded, however, that Judge Bork's views have changed to such a degree, or are so limited in potential

effect, as no longer to threaten profound changes in the constitutional law governing individual rights. We believe, therefore, that the Senate should decline to consent to his nomination to the Supreme Court.

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Wilson, North Carolina

Roxana C. Bacon
Phoenix, Arizona

Jeanne Baker
Montpelier, Vermont

Philip Baskin
Pittsburgh, Pennsylvania

John Q. Beard
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Robert A. Wells
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Rebecca Westerfield
Louisville, Kentucky

William O. Whitehurst, Jr.
Austin, Texas

Karen Hastie Williams
Washington, D.C.

William H. Williams
Spokane, Washington

October 5, 1987

Senator Joseph R. Biden, Jr.
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

The undersigned are all practicing attorneys and partners in Washington law firms. All have served in government and all support the nomination of Judge Robert Bork to the Supreme Court. Judge Bork is one of the most distinguished nominees in the history of the Supreme Court.

As private practitioners who have had an opportunity to observe his work, we are tremendously impressed with the integrity of Judge Bork and the fact that he has devoted nearly his entire professional life to public service. Judge Bork's career has spanned the legal universe and he has excelled in everything he has done: in private practice at the highly regarded firm of Kirkland & Ellis; at Yale Law School, where he held two endowed chairs; as the Solicitor General of the United States; and, finally, as a Judge on the U.S. Court of Appeals for the District of Columbia. Achieving fame in one field would have been enough to cap a brilliant career; Judge Bork has achieved success in all of them.

Judge Bork's opponents grudgingly acknowledge his brilliance; then move on to other matters on their political agendas in an attempt to predict how Judge Bork would respond to issues before the court. All of this based on hysterical speculation and it is thus necessary to re-emphasize the

perspective Judge Bork will bring to the Court, a perspective gained from his incredibly varied and impressive background. Apparently this is understood on the Court, because in an unprecedented move, Justices White and Stevens, certainly two mainstream justices presently on the bench, and former Chief Justice Burger as well, have all come out in support of the nominee, as have a number of distinguished Attorneys General such as Griffin Bell, William French Smith and Elliot Richardson.

The Senate's role in the judicial selection process goes to the heart of the underlying constitutional principle of separation of powers. Article I of the Constitution empowers the President to make judicial appointments to the federal bench with the "advice and consent" of the Senate. Certainly, this envisions a Senate very active in the confirmation process, but that does not mean that the Senate should be allowed to substitute its nominee for that of the Executive. The debate raging these past few months has overlooked this important point, and, thus, there is a danger that one of the most qualified nominees of our time could be a casualty of this debate.

Judge Bork's opponents have attempted to put him outside the mainstream of American jurisprudence. He is not. As a member of the Court of Appeals, not one of his more than 100 majority opinions has been reversed by the Supreme Court and he has been in the majority 95% of the time. In fact, Justice Powell, whose seat is to be filled, has agreed with Judge Bork in 9 out of the 10 cases that originated in the D.C. Circuit and ultimately went to the Supreme Court. As President Carter's Counsel, Lloyd

Cutler, stated, "in my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues ... the essence of [this] judicial philosophy is self-restraint."

Judge Bork's judicial philosophy is one of judicial restraint. This approach is not alien to the mainstream of judicial thought. Judicial restraint is based on the premise that courts are to interpret the law rather than play the role of policy-maker. It is a belief that in a democracy, the will of majority shall be represented, but is tempered with the strong belief that there are certain rights that are not to be subject to any political wind-shifts. These are rights which are truly Constitutional rights. This self-limiting role of the judiciary is what gives the Court its power and preeminence. Suggesting that the court be, in effect, a second Congress by allowing it to do more than interpret the law can take away precious rights and bring the Court into disrepute.

It would be a grave injustice if Judge Bork, one of the nation's most respected legal minds, was denied confirmation on purely political grounds. We urge you to support his nomination on the Senate floor.

Charles J. Ambrose

Henry C. Cashen, II

Robert C. Odle, Jr.

William F. Barr

Ferris Leonard

Patrick E. O'Donnell

David R. Melincoff

Michael Uhlmann

Leon T. Knauer

Thomas Shannon

STATEMENT OF ALFRED AVINS

My name is Alfred Avins and I am appearing in support of Judge Bork's nomination. After having obtained my law degree from Columbia University Law School in 1956 and having obtained two earned research doctorates in law, one from the University of Chicago Law School and the second from the University of Cambridge in England, and having served as a professor at several A.B.A.-accredited law schools, in 1971 I became the founder and first Dean, and later Dean Emeritus, of Delaware Law School in Wilmington. Subsequent thereto, I became founder, and I am former Administrator of, Southern Massachusetts Law School in Fall River. I am co-founder and still Administrator of Northern Virginia Law School.

As a result of my connection with Delaware Law School, I participated in considerable federal court civil litigation, which is now over, but there is still pending litigation arising from Southern Massachusetts Law School. My interest in supporting Judge Bork is designed to insure effective Supreme Court supervision over the lower federal court system.

Both Delaware Law School, during 1974-75, and Southern Massachusetts Law School, in 1981, were inspected for bar examination privileges by teams of liberal law school teachers who knew that I am a conservative and had political antipathy towards me. Certain reports they made were demonstrably untrue and it is a fair inference that they were designed to shake student confidence in my administration. This natural effect was reinforced by information conveyed to students by authorities that my elimination would speed their receipt of bar privileges, and the foreseeable consequences of this manipulation followed.

The manner of my complete removal from Delaware Law School was effectuated by forcing on the school a takeover by Widener College. Three cases reached the United States Court of Appeals for the Third Circuit arising out of the manipulation of the Delaware Law School accreditation process. The first involved the legality under Delaware law of the Widener takeover. The second was an interference and defamation case arising from the American Bar Association's inspection reports. The third contained 21 counts and involved not only a further challenge to the takeover but also was a suit against Widener and the law school for dismissing me as a teacher, removing me as a trustee, otherwise breaching my contract, and committing other common law torts. The issues in these cases were typical civil litigation issues and none involved public policy questions of vast public importance. Because these issues are too numerous to be set forth in this statement, I am annexing my briefs and reply briefs in the first and third cases, and in the second case, my statement to the district judge, which I believe will be more enlightening.

What distinguishes this litigation from the garden-variety federal court cases is that the uniformly liberal judges knew that I was a strong conservative legal academic in contest with the American Bar Association, their refusal of recusal motions at both district court and appellate level, and the truly bizarre reasoning used by the court of appeals to reject all of my contentions. I can only hit a few highlights in this short statement. For example, in the disaffiliation case, dealing in part with the 7th Amendment, the 3rd Circuit held that a writ of replevin could be treated as an equitable remedy, thus denying a right to trial by jury, if the circuit judges decided that the litigant would have been better off not to have sued at law. In the case against the A.B.A. Consultant, the 3rd Circuit held that a defendant in a defamation case can create his own Times v. Sullivan defense by creating a controversy about the plaintiff, whose public figure status is traceable to the defendant's own actions. In the breach of contract case, the 3rd Circuit without opinion affirmed a district court ruling that where an employer appoints six of his employees (whom he has the ability to fire) and these employees find a co-employee guilty of misconduct warranting dismissal, this "kangaroo court" verdict is equal in force to a verdict of an impartial jury. Likewise, the Court of Appeals affirmed a district court's refusal to give weight in determining whether the voluntary withdrawal from a state bar of a recently fired law professor indicated an intent to leave the state, apparently because law professors generally resign from the bar. And the Court of Appeals sanctioned, under Delaware law, corporations, the act of Widener in turning a multi-million dollar law school into a stock

corporation, issuing one share of stock, par value $1, which Widener bought for $1. The annexed briefs and materials indicate many other similar examples of tortured reasoning and patent refusal to follow clear law.

Lest this be brushed aside as the lament of a disappointed litigant, I must point out that disappointment implies that there were expectations of better performance, and after more than 30 years as a conservative lawyer and legal scholar, my expectations of liberal judges are now so minimal that nothing they could do would fall below these expectations. But I am an outraged litigant, because it is an outrage to have a Court of Appeals tell me that replevin which I demanded is an equitable remedy.

As I am now again about to enter into federal court litigation against the Dukakis administration for manipulating the educational licensing process in Massachusetts, I am naturally deeply concerned with insuring that there will be effective Supreme Court supervision over the federal court system. Judge Bork's record indicates that he will follow clear law and will not tolerate weird results. As a once-burned and now twice-shy litigant, that is a hopeful sign. For me, the issue is not his views on abortion, because he is not being appointed to the Delaware or Massachusetts legislature, but rather his views on replevin. If he knows that replevin is a legal remedy and entails a right to trial by jury, and I think that he does, then he knows more than the Court of Appeals which I have had business before does, and his elevation to the Supreme Court clearly serves the public interest.

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

September 23, 1987

The Honorable Joseph R. Biden
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I was distressed to hear Secretary Carla Hills invoke my name yesterday to support the proposition that Judge Bork would be good for women because he would not apply formal equality in the context of sex. This statement is very misleading. I have been, and am, an opponent of Judge Bork's nomination. There is no basis for thinking that Judge Bork will be willing to extend constitutional protection against discrimination to women under any standard. Indeed, what evidence there is suggests that he will construe even statutory protections as narrowly as possible.

I am sending this letter to other members of the committee by regular mail. I would appreciate your sharing the contents of this letter with other members as soon as possible.

Sincerely yours,

Mary E. Becker
Professor of Law

City of Berkeley

Planning & Community
Development Department
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street, 2nd floor
Berkeley, California, 94704
(415) 644-6915

PEACE AND JUSTICE COMMISSION

September 30, 1987

To: Members of the U.S. Senate Judiciary Committee

From: Berkeley Commission on Peace and Justice

Subject: CONFIRMATION OF ROBERT BORK TO THE U.S. SUPREME COURT

Due to the fact that Robert Bork cited Dr. Alexander Meiklejohn in his testimony on the First Amendment before your Committee, and that Dr. Meiklejohn was a resident of Berkeley, the Berkeley Commission on Peace and Justice voted unanimously on September 28, 1987 to send you Dr. Meiklejohn's relevant testimony before the Subcommittee on Constitutional Rights of your Committee in 1955.

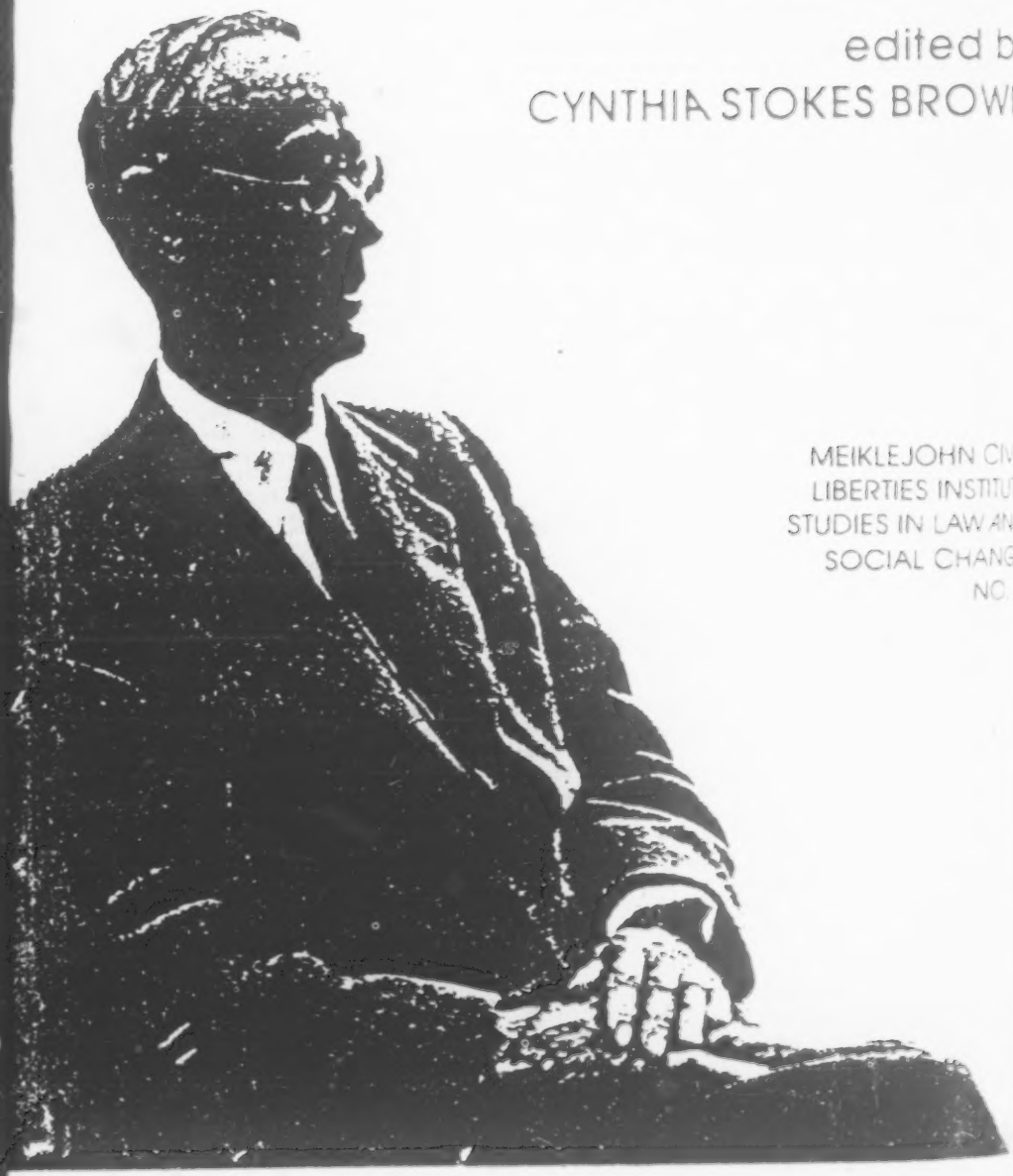
As you will see from the following quotations, Dr. Meiklejohn's understanding of the U.S. Constitution was quite different from that expressed by Robert Bork.

> ...What is the supreme governing agency of this nation? In its opening statement the Constitution answers that question. "We, the People of the United States," it declares, "do ordain and establish this Constitution..." Those are revolutionary words which define the freedom which is guaranteed by the First Amendment. They mark off our government from every form of despotic polity. The legal powers of the people of the United States are not granted to them by some one else--by kings or barons or priests, by legislators or executives or judges. All political authority, whether delegated or not, belongs, constitutionally, to us. If any one else has political authority, we are lending it to him. We, the people, are supreme in our own right. We are governed, directly or indirectly only by ourselves....
>
> ...What shall be read? What he himself decides to read. With whom shall he associate in political advocacy? With those with whom he chooses to associate. Whom shall he oppose? Those with whom he disagrees. Shall any branch of the government attempt to control his opinions or his vote, to drive him by duress or intimidation into believing or voting this way or that? To do this is to violate the Constitution at its very source. We, the people of the United States, are self-governing. That is what our freedom means.

ALEXANDER MEIKLEJOHN
teacher of freedom

a collection of his writings
and a biographical study

edited by
CYNTHIA STOKES BROWN



MEIKLEJOHN CIVIL
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STUDIES IN LAW AND
SOCIAL CHANGE
NO. 2

16

Testimony on the Meaning of the First Amendment

In 1955, when he was eighty-three years old, Meiklejohn was summoned before the Senate Subcommittee on Constitutional Rights to summarize his interpretation of the First Amendment. This was a subcommittee to the Senate Judiciary Committee, also the parent body of the Subcommittee on Internal Security. The Hennings Subcommittee took its

name from its chairman, Thomas Carey Hennings, Jr., who had been elected senator from Missouri in 1950 on a platform of opposition to McCarthyism and the Internal Security Act of 1950. In early 1955, when Hennings was named chairman of the Subcommittee on Civil Rights, he changed its name to Constitutional Rights, so that the committee could examine the whole Bill of Rights to see whether it was being violated. The Senate had censured Senator Joseph McCarthy in November, 1954, but it was still a bad time for the Bill of Rights. Chief Justice Earl Warren said in St. Louis in February, 1955, that if the nation were asked at that time to ratify the Bill of Rights, it would not do so.

The Hennings Subcommittee began its hearings on freedom of speech, press, and assembly by inviting four legal scholars to discuss the extent to which Congress could constitutionally limit these freedoms in the interest of national security. The subcommittee invited Alexander Meiklejohn; Zechariah Chafee, professor of law at Harvard University; Thomas I. Cook, professor of political science at Johns Hopkins University; and Morris L. Ernst, a leading ACLU lawyer in New York City. After these four testified, the subcommittee heard testimony from witnesses about actual conditions. Hennings wanted, by means of these hearings, to reduce the size of the security program and to reform its procedural failings. But before he could issue a final report the Supreme Court, on June 11, 1956, in Cole v Young, *held that the Eisenhower Security Program exceeded the authority granted by Congress in Public Law 733 (1950).*

Meiklejohn's testimony was published in Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, *84th Congress, 1st Session, 1955, Part 1, 1ff. and also in Alexander Meiklejohn,* Political Freedom: The Constitutional Powers of the People *(New York: Oxford University Press, 1965), pp. 107-124.*

Mr. Chairman and Members of the Committee:

I deeply appreciate your courtesy in asking me to join with you in an attempt to define the meaning of the words, "Congress shall make

no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Whatever those words may mean, they go directly to the heart of our American plan of government. If we can understand them we can know what, as a self-governing nation, we are trying to be and to do. Insofar as we do not understand them, we are in grave danger of blocking our own purposes, of denying our own beliefs.

I

It may clarify my own part in our conference if I tell you at once my opinion concerning this much-debated subject. The First Amendment seems to me to be a very uncompromising statement. It admits of no exceptions. It tells us that the Congress and, by implication, all other agencies of the government are denied any authority whatever to limit the political freedom of the citizens of the United States. It declares that with respect to political belief, political discussion, political advocacy, political planning, our citizens are sovereign, and the Congress is their subordinate agent. That agent is authorized, under strong safeguards against the abuse of its power, to limit the freedom of men as they go about the management of their private, their non-political, affairs. But the same men, as they endeavor to meet the public responsibilities of citizenship in a free society, are in a vital sense, which is not easy to define, beyond the reach of legislative control. Our common task, as we talk together today, is to determine what that sense is.

Mr. Chairman, in view of your courtesy to me, I hope you will not find me discourteous when I suggest that the Congress is a subordinate branch of the government of the United States. In saying this I am simply repeating in less passionate words what was said by the writers of the *Federalist* papers when, a century and three-quarters ago, they explained the meaning of the proposed Constitution to a body politic which seemed very reluctant to adopt it. Over and over again the writers of those papers declared that the Constitutional Convention had given to the people adequate protection against a much-feared tyranny of the legislature. In one of the most brilliant statements ever written about the Constitution, the *Federalist* says—

> It is one thing to be subject to the laws, and another to be dependent on the legislative body. The first comports with, the

> last violates, the fundamental principles of good government, and, whatever may be the forms of the Constitution, unites all power in the same hands. (No. 71)

It is chiefly the legislature, the *Federalist* insists, which threatens to usurp the governing powers of the people. In words which unfortunately have some relevance today, it declares that "It is against the enterprising ambition of this department that the people ought to indulge their jealousy and exhaust all their precautions." And, further, the hesitant people were assured that the Convention, having recognized this danger, had devised adequate protections against it. The representatives, it was provided, would be elected by vote of the people. Elections would be for terms brief enough to ensure active and continuous popular control. The legislature would have no law-making authority other than those limited powers specifically delegated to it. A general legislative power to act for the security and welfare of the nation was denied on the ground that it would destroy the basic postulate of popular self-government on which the Constitution rests.

As the *Federalist* thus describes, with insight and accuracy, the Constitutional defenses of the freedom of the people against legislative invasion, it is not speaking of that freedom as an "individual right" which is bestowed upon the citizens by action of the legislature. Nor is the principle of the freedom of speech derived from a law of Nature or of Reason in the abstract. As it stands in the Constitution, it is an expression of the basic American political agreement that, in the last resort, the people of the United States shall govern themselves. To find its meaning, therefore, we must dig down to the very foundations of the self-governing process. And what we shall there find is the fact that when men govern themselves, it is they—and no one else—who must pass judgment upon public policies. And that means that in our popular discussions, unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment is directed. That provision neither the Legislature, nor the Executive, nor the Judiciary, nor

all of them acting together, has authority to nullify. We Americans have, together, decided to be politically free.

2

Mr. Chairman, I have now stated for your consideration the thesis that the First Amendment is not "open to exceptions"; that our American "freedom of speech" is not, on any grounds whatever, subject to abridgment by the representatives of the people. May I next try to answer two arguments which are commonly brought against that thesis in the courts and in the wider circle of popular discussion?

The first objection rests upon the supposition that freedom of speech may on occasion threaten the security of the nation. And when these two legitimate national interests are in conflict, the government, it is said, must strike a balance between them. And that means that the First Amendment must at times yield ground. The freedom of speech must be abridged in order that the national order and safety may be secured.

In the courts of the United States, many diverse opinions have asserted that "balancing" doctrine. One of these, often quoted, reads as follows:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression comes. . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be brought forth.

That opinion tells us that the "government" of the United States has unlimited authority to provide for the security of the nation, as it may seem necessary and wise. It tells us, therefore, that constitutionally, the government which has created the defenses of political freedom may break down those defenses. We, the people, who have enacted the First Amendment, may by agreed-upon procedure modify or annul that amendment. And, since we are, as a government, a sovereign nation, I do not see how any of these assertions can be doubted or denied. We Americans, as a body-politic, may destroy or limit our freedom whenever we choose. But what bearing has that

statement upon the authority of Congress to interfere with the provisions of the First Amendment? Congress is not the government. It is only one of four branches to each of which the people have denied specific and limited powers as well as delegated such powers. And in the case before us, the words, "Congress shall make no law . . . abridging the freedom of speech," give plain evidence that, so far as Congress is concerned, the power to limit our political freedom has been explicitly denied.

There is, I am sure, a radical error in the theory that the task of "balancing" the conflicting claims of security and freedom has been delegated to Congress. It is the failure to recognize that the balancing in question was carefully done when, one hundred seventy years ago, the Constitution was adopted and quickly amended. The men who wrote the text of that Constitution knew, quite as well as we do, that the program of political freedom is a dangerous one. They could foresee that, as the nation traveled the ways of self-government, the freedom of speech would often be used irresponsibly and unwisely, especially in the times of war or near-war, and that such talking might have serious consequences for the national safety.

They knew, too, that a large section of the voting population was hostile to the forms of government which were then being adopted. And, further, they had every reason to expect that in a changing world, new dissatisfactions would arise and might in times of stress break out into open and passionate disaffection. All these considerations, I am saying, were as clearly and as disturbingly present to their minds as they are to our minds today. And because of them, the First Amendment might have been written, not as it is, but as the Courts of the United States have re-written it in the war-maddened years since 1919. The Amendment might have said, "Except in times and situations involving 'clear and present danger' to the national security, Congress shall make no law abridging the freedom of speech." Or it might have read, "Only when, in the judgment of the legislature, the interests of order and security render such action advisable shall Congress abridge the freedom of speech." But the writers of the Amendment did not adopt either of these phrasings or anything like them. Perhaps a minor reason for their decision was the practical certainty that the Constitution, if presented in that form, would have failed of adoption. But more important than such questionable historical speculation are two reasons which are as valid today as they were

when the Amendment was decreed.

First, our doctrine of political freedom is not a visionary abstraction. It is a belief which is based in long and bitter experience, which is thought out by shrewd intelligence. It is the sober conviction that, in a society pledged to self-government, it is never true that, in the long run, the security of the nation is endangered by the freedom of the people. Whatever may be the immediate gains and losses, the dangers to our safety arising from political suppression are always greater than the dangers to that safety arising from political freedom. Suppression is always foolish. Freedom is always wise. That is the faith, the experimental faith, by which we Americans have undertaken to live. If we, the citizens of today, cannot shake ourselves free from the hysteria which blinds us to that faith, there is little hope for peace and security, either at home or abroad.

Second, the re-writing of the First Amendment which authorizes the legislature to balance security against freedom denies not merely some minor phase of the amendment but its essential purpose and meaning. Whenever, in our Western civilization, "inquisitors" have sought to justify their acts of suppression, they have given plausibility to their claims only by appealing to the necessity of guarding the public safety. It is that appeal which the First Amendment intended, and intends, to outlaw. Speaking to the legislature, it says, "When times of danger come upon the nation, you will be strongly tempted, and urged by popular pressure, to resort to practices of suppression such as those allowed by societies unlike our own in which men do not govern themselves. You are hereby forbidden to do so. This nation of ours intends to be free. 'Congress shall make no law . . . abridging the freedom of speech.' "

The second objection which must be met by one who asserts the unconditional freedom of speech rests upon the well-known fact that there are countless human situations in which, under the Constitution, this or that kind of speaking may be limited or forbidden by legislative action. Some of these cases have been listed by the courts in vague and varying ways. Thus libels, blasphemies, attacks upon public morals or private reputation have been held punishable. So too, we are told that "counselling a murder" may be a criminal act, or "falsely shouting fire in a theatre, and causing a panic." "Offensive" or "provocative" speech has been denied legislative immunity. "Contempt of court," shown by the use of speech or by refusal to speak,

may give basis for prosecution. Utterances which cause a riot or which "incite" to it may be subject to the same legal condemnation. And this listing of legitimate legislative abridgments of speech could be continued indefinitely. Their number is legion.

In view of these undoubted facts, the objection which we must now try to meet can be simply stated. In all these cases, it says, inasmuch as speaking is abridged, "exceptions" are made to the First Amendment. The Amendment is thus shown to be, in general, "open to exceptions." And from this it follows that there is no reason why a legislature which has authority to guard the public safety should be debarred from making an "exception" when faced by the threat of national danger.

Now the validity of that argument rests upon the assumed major premise that whenever, in any way, limits are set to the speaking of an individual, an "exception" is made to the First Amendment. But that premise is clearly false. It could be justified only if it were shown that the Amendment intends to forbid every form of governmental control over the act of speaking. Is that its intention? Nothing could be further from the truth. May I draw an example from our own present activities in this room? You and I are here talking about freedom within limits defined by the Senate. I am allowed to speak only because you have invited me to do so. And just now everyone else is denied that privilege. But further, you have assigned me a topic to which my remarks must be relevant. Your schedule, too, acting with generosity, fixes a time within which my remarks must be made. In a word, my speaking, though "free" in the First Amendment sense, is abridged in many ways. But your speaking, too, is controlled by rules of procedure. You may, of course, differ in opinion from what I am saying. To that freedom there are no limits. But unless the chairman intervenes, you are not allowed to express that difference by open speech until I have finished my reading. In a word, both you and I are under control as to what we may say and when and how we may say it. Shall we say, then, that this conference, which studies the principle of free speech, is itself making "exceptions" to that principle? I do not think so. Speech, as a form of human action, is subject to regulation in exactly the same sense as is walking, or lighting a fire, or shooting a gun. To interpret the First Amendment as forbidding such regulation is to so misconceive its meaning as to reduce it to nonsense.

The principle here at issue was effectively, though not clearly, stated by Mr. Justice Holmes when, in the *Frohwerk* case, he said—

> The First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity to every form of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person, ever supposed that to make criminal the counselling of a murder would be an unconstitutional interference with free speech.

Those words of the great Justice, by denying that the First Amendment intends to forbid such abridgments of speech as the punishing of incitement to murder, seem to me to nullify completely the supposed evidence that the amendment is "open to exceptions." They show conclusively the falsity of the "exception" theory which has been used by the courts to give basis for the "danger" theory of legislative authority to abridge our political freedom. If, then, the "danger" theory is to stand it must stand on its own feet. And those feet, if my earlier argument is valid, seem to be made of clay.

3

Mr. Chairman, in the first section of this paper I spoke of the negative fact that the First Amendment forbids the legislature to limit the political freedom of the people. May I now, surveying the same ground from its positive side, discuss with you the active powers and responsibilities of free citizens, as these are described or taken for granted in the general structure of the Constitution as a whole? If I am not mistaken, we shall find here the reasons why the words of the great proclamation are so absolute, so uncompromising, so resistant of modification or exception.

The purpose of the Constitution is, as we all know, to define and allocate powers for the governing of the nation. To that end, three special governing agencies are set up, and to each of them are delegated such specific powers as are needed for doing its part of the work.

Now that program rests upon a clear distinction between the political body which delegates powers and the political bodies—Legislative, Executive, and Judicial—to which powers are delegated. It presupposes, on the one hand, a supreme governing agency to which,

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originally, all authority belongs. It specifies, on the other hand, subordinate agencies to which partial delegations of authority are made. What, then, is the working relation between the supreme agency and its subordinates? Only as we answer that question shall we find the positive meaning of the First Amendment.

First of all, then, what is the supreme governing agency of this nation? In its opening statement the Constitution answers that question. "We, the People of the United States," it declares, "do ordain and establish this Constitution . . ." Those are revolutionary words which define the freedom which is guaranteed by the First Amendment. They mark off our government from every form of despotic polity. The legal powers of the people of the United States are not granted to them by some one else—by kings or barons or priests, by legislators or executives or judges. All political authority, whether delegated or not, belongs, constitutionally, to us. If any one else has political authority, we are lending it to him. We, the people, are supreme in our own right. We are governed, directly or indirectly, only by ourselves.

But now what have we, the people, in our establishing of the Constitution, done with the powers which thus inhere in us? Some of them we have delegated. But there is one power, at least, which we have not delegated, which we have kept in our own hands, for our own direct exercise. Article 1, (2), authorizes the people, in their capacity as "electors," to choose their representatives. And that means that we, the people, in a vital sense, do actively govern those who, by other delegated powers, govern us. In the midst of all our assigning of powers to legislative, executive, and judicial bodies, we have jealously kept for ourselves the most fundamental of all powers. It is the power of voting, of choosing by joint action, those representatives to whom certain of our powers are entrusted. In the view of the Constitution, then, we the people are not only the supreme agency. We are also, politically, an active electorate—a Fourth, or perhaps better, a First Branch which, through its reserved power, governs at the polls. That is the essential meaning of the statement that we Americans are, in actual practice, politically a free people. Our First Amendment freedom is not merely an aspiration. It is an arrangement made by women and men who vote freely and, by voting, govern the nation. That is the responsibility, the opportunity, which the Constitution assigns to us, however slackly and negligently we may at times

have exercised our power.

It follows from what has just been said that under the Constitution, we Americans are politically free only insofar as our voting is free. But to get the full meaning of that statement we must examine more closely what men are doing when they vote, and how they do it.

The most obvious feature of activity at the polls is the choosing among candidates for office. But under our election procedures, with their party platforms and public meetings, with the turmoil and passion of partisan debate, the voters are also considering and deciding about issues of public policy. They are thinking. As we vote we do more than elect men to represent us. We also judge the wisdom or folly of suggested measures. We plan for the welfare of the nation. Now it is these "judging" activities of the governing people which the First Amendment protects by its guarantees of freedom from legislative interference. Because, as self-governing women and men, we the people have work to do for the general welfare, we make two demands. First, our judging of public issues, whether done separately or in groups, must be free and independent—must be our own. It must be done by us and by no one else. And second, we must be equally free and independent in expressing, at the polls, the conclusions, the beliefs, to which our judging has brought us. Censorship over our thinking, duress over our voting, are alike forbidden by the First Amendment. A legislative body, or any other body which, in any way, practices such censorship or duress, stands in "contempt" of the sovereign people of the United States.

But, further, what more specifically are the judging activities with which censorship and duress attempt to interfere? What are the intellectual processes by which free men govern a nation, which therefore must be protected from any external interference? They seem to be of three kinds.

First, as we try to "make up our minds" on issues which affect the general welfare, we commonly—though not commonly enough—read the printed records of the thinking and believing which other men have done in relation to those issues. Those records are found in documents and newspapers, in works of art of many kinds. And all this vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument, the voter may find ready to help him in making up his mind.

Second, we electors do our thinking, not only by individual reading and reflection, but also in the active associations of private or public discussion. We think together, as well as apart. And in this field, by the group action of congenial minds, by the controversies of opposing minds, we form parties, adopt platforms, conduct campaigns, hold meetings, in order that this or that set of ideas may prevail, in order that that measure or this may be defeated.

And third, when election day finally comes, the voter, having presumably made up his mind, must now express it by his ballot. Behind the canvas curtain, alone and independent, he renders his decision. He acts as sovereign, one of the governors of his country. However slack may be our practice, that, in theory, is our freedom.

What, then, as seen against this Constitutional background, is the purpose of the First Amendment, as it stands guard over our freedom? That purpose is to see to it that in none of these three activities of judging shall the voter be robbed, by action of other, subordinate branches of the government, of the responsibility, the power, the authority, which are his under the Constitution. What shall be read? What he himself decides to read. With whom shall he associate in political advocacy? With those with whom he chooses to associate. Whom shall he oppose? Those with whom he disagrees. Shall any branch of the government attempt to control his opinions or his vote, to drive him by duress or intimidation into believing or voting this way or that? To do this is to violate the Constitution at its very source. We, the people of the United States, are self-governing. That is what our freedom means.

4

Mr. Chairman, this interpretation of the First Amendment which I have tried to give is, of necessity, very abstract. May I, therefore, give some more specific examples of its meaning at this point or that?

First, when we speak of the Amendment as guarding the freedom to hear and to read, the principle applies not only to the speaking or writing of our own citizens but also to the writing or speaking of every one whom a citizen, at his own discretion, may choose to hear or to read. And this means that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of

this nation. The Bible, the Koran, Plato, Adam Smith, Joseph Stalin, Gandhi, may be published and read in the United States, not because they have, or had, a right to be published here, but because we, the citizen-voters, have authority, have legal power, to decide what we will read, what we will think about. With the exercise of that "reserved" power, all "delegated" powers are, by the Constitution, forbidden to interfere

Second, in the field of public discussion, when citizens and their fellow thinkers "peaceably assemble" to listen to a speaker, whether he be American or foreign, conservative or radical, safe or dangerous, the First Amendment is not, in the first instance, concerned with the "right" of the speaker to say this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration

Third, the same freedom from attempts at duress is guaranteed to every citizen as he makes up his mind, chooses his party, and finally casts his vote. During that process, no governing body may use force upon him, may try to drive him or lure him toward this decision or that, or away from this decision or that. And for that reason, no subordinate agency of the government has authority to ask, under compulsion to answer, what a citizen's political commitments are. The question, "Are you a Republican?" or "Are you a Communist?", when accompanied by the threat of harmful or degrading consequences if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the "reserved powers" of the governing people. And the freedom thus protected does not rest upon the Fifth Amendment "right" of one who is governed to avoid self-incrimination. It expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists.

And fourth, for the same reason, our First Amendment freedom forbids that any citizen be required under threat of penalty to take an oath, or make an affirmation as to beliefs which he holds or rejects. Every citizen, it is true, may be required, and should be required, to pledge loyalty, and to practice loyalty, to the nation. He must agree to support the Constitution. But he may never be required to *believe* in the Constitution. His loyalty may never be tested on grounds of

adherence to, or rejection of, any *belief*. Loyalty does not imply conformity of opinion. Every citizen of the United States has Constitutional authority to approve or to condemn any laws enacted by the Legislature, any actions taken by the Executive, any decisions rendered by the Judiciary, and any principles established by the Constitution. All these enactments which, as men who are governed, we must obey, are subject to our approval or disapproval, as we govern. With respect to all of them, we, who are free men, are sovereign. We are "The People." We govern the United States.

5

Mr. Chairman, I have tried to state and defend the assertion that Constitutional guarantee of political freedom is not "open to exceptions." Judgment upon the theoretical validity of that position I now leave in your hands.

But as between conflicting views of the First Amendment, there is also a practical question of efficiency. May I, in closing, speaking with the tentativeness becoming to a non-lawyer, offer three suggestions as to the working basis on which decisions about political freedom should rest?

First, the experience of the courts since 1919 seems to me to show that, as a procedural device for distinguishing forms of speech and writing and assembly which the Amendment does protect from those which it does not protect, the "clear and present danger" test has failed to work. Its basic practical defect is that no one has been able to give it dependable, or even assignable, meaning. Case by case, opinion by opinion, it has shifted back and forth with a variability of meaning which reveals its complete lack of Constitutional basis. In his opinion confirming the conviction of Eugene Dennis and others for violation of the Smith Act, Judge Learned Hand reviewed the long series of judicial attempts to give to the words "clear and present" a usable meaning. His conclusion reads, in part, as follows:

> The phrase "clear and present danger". . . is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the "evil," discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger.

And to this bewildering interpretation of the words, "clear and present," he adds:

> That is a test in whose application the utmost differences of opinion have constantly arisen, even in the Supreme Court. Obviously it would be impossible to draft a statute which should attempt to prescribe a rule for each occasion; and it follows, as we have said, either that the Act is definite enough as it stands, or that it is practically impossible to deal with such conduct in general terms.

Those words, coming from the penetrating and powerful mind of Learned Hand, show how intolerable it is that the most precious, most fundamental, value in the American plan of government should depend, for its defense, upon a phrase which not only has no warrant in the Constitution but has no dependable meaning, either for a man accused of crime or for the attorneys who prosecute or defend him or for the courts which judge him. That phrase does not do its work. We need to make a fresh start in our interpreting of the words which protect our political freedom.

Second, as we seek for a better test, it is of couse true that no legal device can transform the making of decisions about freedom into a merely routine application of an abstract principle. Self-government is a complicated business. And yet, the "no-exception" view which I have offered seems to me to promise a more stable and understandable basis for judicial decision than does the 1919 doctrine which the courts have been trying to follow. For example, the most troublesome issue which now confronts our courts and our people is that of the speech and writing and assembling of persons who find, or think they find, radical defects in our form of government, and who devise and advocate plans by means of which another form might be substituted for it. And the practical question is, "How far, and in what respects, are such revolutionary planning and advocacy protected by the First Amendment?"

It is, of course, understood that if such persons or groups proceed to forceful or violent action, or even to overt preparation for such action, against the government, the First Amendment offers them, in that respect, no protection. Its interest is limited to the freedom of judgment-making—of inquiry and belief and conference and persuasion and planning and advocacy. It does not protect either overt action

or incitement to such action. It is concerned only with those political activities by which, under the Constitution, free men govern themselves.

From what has just been said it follows that, so far as speech and writing are concerned, the distinction upon which the application of the First Amendment rests is that between "advocacy of action" and "incitement to action." To advocacy the amendment guarantees freedom, no matter what may be advocated. To incitement, on the other hand, the amendment guarantees nothing whatever.

This distinction was sharply drawn by Justice Brandeis when, in the *Whitney* case, he said—

> Every denunciation of existing law tends in some measure to increase the probability that there will be violations of it. Condonation of a breach enhances the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.

Those words, I think, point the way which decisions about our political freedom can, and should, follow. An incitement, I take it, is an utterance so related to a specific overt act that it may be regarded and treated as a part of the doing of the act itself, if the act is done. Its control, therefore, falls within the jurisdiction of the legislature. An advocacy, on the other hand, even up to the limit of arguing and planning for the violent overthrow of the existing form of government, is one of those opinion-forming, judgment-making expressions which free men need to utter and to hear as citizens responsible for the governing of the nation. If men are not free to ask and to answer the question, "Shall the present form of our government be maintained or changed?"; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people. It is not enough to say that the people of the United States were free one hundred seventy years ago. The First Amendment requires, simply and without equivocation, that they be free now.

Third, and finally, if we say, as this paper has urged, that in many situations, speech and writing and assembly may be controlled by legislative action, we must also say that such control may never be based on the ground of disagreement with opinions held or expressed. No belief or advocacy may be denied freedom if, in the same situation, opposing beliefs or advocacies are granted that freedom.

If then, on any occasion in the United States, it is allowable to say that the Constitution is a good document, it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may be likewise publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may, with equal freedom, be said that those of England or Russia or Germany are superior to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is "before the house," free men choose to meet it, not with their eyes shut, but with their eyes open. To be afraid of any idea is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.

TESTIMONY

Submitted by
B'NAI B'RITH WOMEN
on the nomination of
JUDGE ROBERT H. BORK
to the Supreme Court

Senate Judiciary Committee
September 1987

This testimony is submitted on behalf of the 120,000 members of B'nai B'rith Women. Members of B'nai B'rith Women are Jewish women who live in cities and towns across the country. We are women of all ages who are, by and large, part of the mainstream of American life. I have heard from many of our members in the weeks since Judge Bork's nomination and the overriding message I'm receiving is one of alarm at the possibility of his confirmation.

We are concerned that if Judge Bork's nomination to the Supreme Court is confirmed by the Senate, we will see a marked -- and unwanted--- change in individual rights, women's rights and civil rights. Many of us are activists and had to fight to secure these rights. But even more of us have simply built our lives assuming that certain fundamental freedoms were ours and that in this country they would be ours forever.

We remember the days when there was prayer in schools and how excluded we felt. We remember the days before abortion was legal and know the degradation many women felt about having to resort to back alley abortions. We remember segregated lunch counters and poll taxes and institutions of higher learning that closed their doors to men and women who were not white. We remember when we finished college -- some of us the first women in our families to do so -- and were told that beyond teaching and social work, we would never go very far. We remember a world that was ripe for the merciful and judicious intervention of the courts. And the courts did not let us down.

Now, we are concerned that those rights that we have fought for or assumed were secure may be reversed if Judge Bork is appointed to the court.

We base this view on Judge Bork's writings and opinions on such matters as the separation of church and state, privacy, abortion rights and discrimination on the basis of race or gender.

In these areas, Judge Bork's opinions appear to be guided by a rigid interpretation of what the Constitution protects as a "right." We believe that his opposition to numerous Supreme Court decisions in the recent past threatens the gains we have made, as a country, in the last twenty years of social progress. And we are concerned.

We are concerned that with Judge Bork on the Supreme Court, we will see serious erosion in the wall of separation between church and state. He has stated that the Supreme Court made a mistake in 1962 when it ruled that public school officials could not require students to recite a state-sanctioned prayer. In commenting on tax aid to private schools, he called for "the reintroduction of some religion into public schools and some greater religious symbolism in our public life."

Judge Bork has stated that the nation has grown to be too "secularized" -- that making religion a little more pervasive in our lives would not be such a bad thing. In his view, what our society needs is a little more "public morality." We are greatly troubled by these suggestions. Whose religion? Whose morality? Whose decisions?

We fear he would implement the public morality with mandated school prayer, public funding of private religious schools, the reintroduction of government intrusion into areas of religion. We, in B'nai B'rith Women believe, as James Madison said, that religion is "too personal, too sacred, too holy," to be subject to government interference. It is precisely the freedom from this interference that attracted our parents and grandparents to this country. It is the principle that has ensured all religious minorities in our country freedom from possible abuse from the majority.

We are concerned that Judge Bork's record demonstrates insufficient sensitivity to the needs of minorities in general. We are especially distressed at his record on women's rights. His interpretation of the equal protection clause of the fourteenth amendment makes it virtually impossible for women to rely on the court to deal sternly with offenders in sex discrimination cases.

We are also dismayed that Judge Bork does not see room in the Constitution for the guaranteed right of reproductive freedom. He opposes the landmark pro-choice decision of Roe v. Wade on the grounds that it is "unconstitutional." But what do we say to our daughters and granddaughters in that case? That they have no privacy? Or that they have no freedom to make important moral choices?

Judge Bork's views on free and private choice do not stop with abortion rights. In 1965, he supported a Connecticut law that banned the use of contraceptives, even by married people. In Judge Bork's view, the Supreme Court gave too much latitude to the constitutional definition of privacy. What concerns us, is his seeming preference for something worse -- government intrusion into the private lives of citizens.

We are also troubled by his record on civil rights. Judge Bork seems to have balked at every major juncture of progress in the area of civil rights. Although he has since recanted a number of his former positions in this area, we are troubled by his lack of foresight.

In a 1963 article for New Republic Judge Bork opposed provisions of the Civil Rights Act that would require the desegregation of public facilities. Although he has since recanted the views expressed in that article, it suggests that he failed to see how important legislative action on civil rights was at that moment in history.

As Jewish women, we understand how important it is to cry out against injustice in a timely manner. We have learned the hard way that to hesitate in the face of oppression can have disastrous consequences.

We are also concerned about Judge Bork's participation in the "Saturday Night Massacre," during Watergate which included the firing of special prosecutor Archibald Cox. His actions during that period have raised serious questions about whether he was willing to sidestep the law in order to serve the president. At the moment, the Supreme Court is tentatively balanced on the issue of the separation of church and state and on other issues that concern us. We fear that if Robert Bork is appointed to the Court, the balance on this issue and others will shift and shift radically.

It is difficult to get Judge Bork into focus. On one hand, he consistently interprets the Constitution through the narrow lens of "original intent." Yet on the other hand, he has reversed his opinion so many times that one wonders how he will ultimately decide crucial cases in the areas of individual rights, women's rights and civil rights.

We oppose the nomination of Robert Bork, finally, because we are not convinced that he cares enough about the rights of women and minorities to consistently interpret the Constitution

with their well-being in mind. We are concerned that a Constitution that is rigorously interpreted without regard to the vulnerable segments of our society is not the document we have known or have relied upon for so many years.

We urge you to oppose the appointment of Robert Bork to the Supreme Court.

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

September 28, 1987

The Honorable Harold R. Tyler, Jr.
Chairman
American Bar Association
30 Rockefeller Plaza
Suite 3600
New York, New York 10112

Dear Judge Tyler:

I understand that Judge Bork, at Senator Biden's request, has authorized you to release to the Senate Judiciary Committee memoranda and reports concerning the dismissal of Archibald Cox you prepared following President Reagan's nomination of Judge Bork to the Supreme Court. The Department of Justice hereby waives its privilege with respect to these documents and has no objection to their release to the Committee.

I ask that you provide me with a copy of the documents you provide to the Committee.

Sincerely,

John R. Bolton
Assistant Attorney General

cc:

The Honorable Joseph R. Biden, Jr.
The Honorable Strom Thurmond

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

September 28, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

As you requested in your letter of September 23, 1987, I have sent a letter to Judge Tyler authorizing the release of memoranda and reports relating to the dismissal of Archibald Cox and prepared by the ABA following my nomination to the Supreme Court. I am enclosing a copy of that letter for your convenience.

Please let me know if I can be of further assistance.

Sincerely,

Robert H. Bork

Robert H. Bork

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

September 28, 1987

The Honorable Harold R. Tyler, Jr.
Chairman
American Bar Association
30 Rockefeller Plaza
Suite 3600
New York, New York 10112

Dear Judge Tyler:

Senator Biden informs me that, on the authority of my oral waiver, you furnished the Senate Judiciary Committee with copies of statements I made to the ABA in 1982 regarding the events surrounding the dismissal of Archibald Cox.

Senator Biden also requests that I waive any objection to the release of any additional memoranda or reports relating to the dismissal of Mr. Cox which you may have compiled in connection with my nomination to the Supreme Court. I have no objection to the release of these documents to the Committee, and would appreciate receiving a copy of whatever materials are provided.

I appreciate your cooperation in this matter.

Sincerely,

Robert H. Bork

Robert H. Bork

cc: Honorable Joseph R. Biden, Jr.

Brigham Young University
J. Reuben Clark Law School

September 28, 1987

Senator Joseph Biden
U.S. Senate
Washington, D.C.

Dear Senator Biden:

We of the BYU law faculty want to express our concern that the views expressed by Judge Bork are too extreme to make him an appropriate nominee for Supreme Court Justice. Our opinion reflects vital concerns that Judge Bork will undermine well established constitutional and statutory protections.

Sincerely,

Michael Goldsmith
Professor of Law

Jean Wegman Burns
Associate Professor of Law

Constance Lundberg
Professor of Law

cc

"BLIND SPOT FOR BLACKS"-- AND WOMEN or LETTER FROM NORTH CAROLINA

Albert Broderick

In 1864 when Lincoln was considering a replacement for the deceased Chief Justice Roger B. Taney he knew what he was looking for. "[W]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders [wartime greenback legislation]." [2 Warren, The Supreme Court in United States History, 401] But, he added, "We cannot ask a man what he will do; and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known."

Until recently nominees to the Court did not even present themselves to the Senate Judiciary Committee. Apparently times have really changed. Even before the hearings started on his nomination to the Court Judge Robert H. Bork was active in his own behalf. The New York Times' Linda Greenhouse put it this way: "By the time of the hearings, he will have met individually with nearly all 14 members of the Judiciary Committee and with many, if not most, of the other 86 senators as well." [Times, Aug. 4, 1987, p. 12] Leave aside the now-celebrated White House briefing book and its crude attempt to repackage Bork as at once a closet moderate, a Brandeis liberal, and a Powell conservative.. In a recent interview (Newsweek, Sept. 14, 1987, p.14), Bork remarks that "I have, as you may have noticed, a record." He then seems to disparage some of "the stuff I wrote in the old days". He adds that even in light of his most current reformulations "I don't know how a lot of these things would come out," that is, in his opinions as a Justice of the United States Supreme Court. Fair enough. I've been puzzling another question: Does where the nominee has been tell anything significant about who the person is that aspires to succeed retired Justice Lewis Powell as the "swing Justice" on the Court, and where he will (or may) be?.

Who, you ask, is posing this question? I've been in constitutional law for almost 25 years-- teaching law students, writing articles in law reviews, and working on briefs for the Supreme Court. These briefs include some solo efforts of my own (in cases that I'll be discussing-- Bakke (1977), Bob Jones University (1983) and Sheet Metal Workers (1986)). And there was a lone summons to testify at a Senate hearing-- in favor of a bill to soften the impact of an opinion by Justice Powell that restricted the standing of litigants to have access to the courts. (The bill didn't pass.)

For the past thirteen years whatever I've touched --teaching, writing, briefing-- it seems Powell was there. Sometimes he'd aggravate with his flat "No." More often he'd join naysaying majorities, but supply a concurrence that showed the loser a way to half a loaf. In the access to courts issue, he pointed out avenues around his own tough language. His vote sent Allan Bakke to become a doctor and left the state medical school's affirmative action plan in smithereens (Bakke, 1978). But his opinion in Bakke identified circumstances in which affirmative action for minorities (and women) could be possible. In a later case that upheld minority preferences (Fullilove, 1980), Justice Powell recalled the Supreme Court's role in perpetuating the badges of slavery: "Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination." He cited Plessy v. Ferguson, the 1896 case whose "separate but equal" doctrine spawned racially segregated schools, and Dred Scott v. Sandford, in which Chief Justice Taney wrote for the Supreme Court in 1857 that even free blacks could not be citizens and that Congress could

not exclude slavery from newly admitted states. As we know, Dred Scott produced a Civil War. Plessy, just as clearly, led to 75 years of racial segregation in schools and in all public facilities. In 1986 and 1987, over the uncompromising opposition of President Reagan's Department of Justice, Powell supplied the vote and analysis that upheld affirmative action as a remedy for egregious past race and sex discrimination.

On April 11, 1987 Justice Powell spoke in Chapel Hill, North Carolina, at the retirement dinner tendered to the distinguished professor and Supreme Court specialist, Eugene Gressman. Powell's speech dealt admiringly with a Virginia law teacher who had both John Marshall and Thomas Jefferson as pupils, Chancellor George Wyeth. Many of us were hearing of Wyeth for the first time. When we got around to it we learned that Wyeth's most remembered legal effort pronounced slavery unconstitutional under the Virginia constitution. While he was in town, Justice Powell met with members of the University of North Carolina law faculty (not my own). Two colleagues who met with him reported that one professor confronted Justice Powell with what seemed a bold query: Was there any imminent prospect of a resignation from the Supreme Court? Powell had replied forthrightly: None. Terry Eastland, Attorney General Meese's spokesman, after the most recent affirmative action decision had commented that a couple of appointments to the Court would turn it around. Mindful of this and the ripe years and occasional indispositions of Justices Blackmun (78), Brennan (81), and Marshall (79), Justice Powell's reassurance provoked many sighs of relief.

My scene shifts to Atlanta and the morning of June 27, 1987. In town for a former colleague's wedding, my wife and I were staying at one of those hotels that deliver the local paper to the door before breakfast. Tappy broke the morning silence: "There's bad news today." What a powerful understatement. Justice Powell had resigned, the Justice whom, more than any other, I had argued with and sought to win over (in print). Despite occasional aggravations, his sensitivity, openness, and simple striving for fairness left his mark on me. The loss was personal.

There was now a crucial vacancy. On July 1st Chief of Staff Howard Baker apparently persuaded President Reagan to send up to the Senate the short list he was "considering". The very next day, the President announced his choice: Robert H. Bork. In June of 1986 Evans and Novak, the conservative columnists, reported as fact that Justice Powell would resign at the end of the Court's Term lastyear, and be replaced by Judge Bork of the Court of Appeals for the District of Columbia. Justice Powell had promptly announced that he had no intention of retiring. After the presidenial nomination of Judge Bork on July 2, 1987 Evans and Novak modestly recalled their previous forecast; they merely had the wrong year. The Bork nomination was hardly a surprise. A Herblock cartoon had a wife taunting a stunned husband: "You were expecting maybe Edward M. Kennedy." A "whaddya gonna do"-type recalled a gag from New Deal days that he found in the Yalta Papers. Roosevelt had indeed told Stalin of a farmer's gift of a bottle of whiskey to an elderly employee. The employer asked later "How was the whiskey?" The hired hand said "Just right." Just what did that mean? "If it had been better you wouldn't have given it to me; if it had been any worse it would have killed me."

The ensuing ten weeks have made clear that opponents of the Bork nomination have no intention of swallowing it without going behind the label. I soon got caught up in the vortex, collecting clippings, reading the stream of material, old and new, sorting out on paper where it led me. Draft followed draft into the round file under my desk. In an earlier draft I charted the institutional advocates and

opponents and their respective moves week-by-week. That was dull, and already densely covered in the media. I settled on what I thought were two major reasons why an uncommitted Senator should vote against the nomination. That kept part of my focus here at home.

My Senator, Terry Sanford, had returned home from an inspection trip to the U.S.S.R. some weeks after the opening gun was fired. He announced that he would make his decision on the basis of his "conscience." Assuming, as I do, that Sanford's test leaves space for an intelligent review of constitutional history, why not vote for Bork? After all, my other Senator, Jesse Helms, viewed as comfortably in Bork's camp, can hardly be seen as voting against his conscience. Some recent research and writing had convinced me that when the Constitution itself is silent or ambiguous a person's answer in conscience to a question like this depends on a kind of constitutional belief system. Generally it forces one to ask "What kind of country do I want this to be?" Measured by this test, President Reagan was clearly justified in nominating Judge Bork, and Senator Helms in supporting him. I would hope that, just as clearly, it will bring Senator Sanford and the handful of crucial undecideds to vote against the nomination.

I said that two major reasons combined to convince me that the Senate should withhold consent from the Bork nomination. The first is simple history, and comes under the heading of "constitutional politics." Of course, as Bork and everyone else back to John Marshall have agreed, the Constitution is "law." But, unlike ordinary private law, from the beginning the Supreme Court has interpreted imprecise formulations in the Constitution by making political choices, choices that it claimed were consistent with the language of the document. Some of these choices have proved horrible, and some very good. And there has usually been disagreement as to whether a particular choice is one or the other.

Two universally admired Supreme Court Justices of a generation ago, Robert H. Jackson and Benjamin N. Cardozo, rejected the notion that the Court's constitutional process could be reduced to "framers' intent" and "neutral principles", Judge Bork's twin canons of judicial "Lestoil."

Justice Jackson (for whom the present Chief Justice was a law clerk) referred to the Supreme Court as "a political institution arbitrating the allocation of powers between different branches of the Federal Government, between state and nation, between state and state, and between majority government and minority rights." He recalled a concurring comment by Justice Cardozo, who had served for 18 years on New York's highest court before joining the United States Supreme Court: "[I]t [the New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction...and with politics." After recalling Cardozo's comment, Jackson observed that Justice Cardozo "used 'politics' in no sense of partisanship but in the sense of policy-making. His remarks point to some features of the federal judicial power which distinguish it from the functions of the usual law court."

Justice Jackson noted the absence of guidance in the Constitution itself: "[N]either the text of the Constitution nor the debates in the Constitutional Convention gave any clear forecast of the part the Court was expected to play .... The Constitution and the Judiciary Act of 1789 so far as federal cases were concerned launched a Court without a jurisprudence, which is something like launching a ship

without a rudder. The Court of course had no tradition of its own....The Supreme Court was not bound to any particular body of learning for guidance....In five of Marshall's great opinions he cited not a single precedent."

In three current law review articles I have examined Jackson's insight in light of the way the Supreme Court has actually decided constitutional cases. The "framers' intent" theory --the key to the constitutional learning of Attorney General Meese and Judge Bork--offered small help to the Court in its first half century, for the framers' had agreed not to publicize the proceedings of the Constitutional Convention for 50 years. This silence was not broken until the publication in 1840 of James Madison's journals. Moreover, in the Marshall and Taney years, when constitutional cases constituted a very small part of the business of the Supreme Court, special rules were promulgated for constitutional cases, rules that differed from those applying to the private law cases that dominated the Court's docket. For example in 1834 Chief Justice Marshall announced such a constitutional rule of decision that persisted in successor Courts: "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment where constitutional cases are involved, unless four [of seven] judges concur in opinion, thus making the decision that of a majority of the whole court." The common law practice of following precedent was never slavishly followed in constitutional cases. In 1837 when Chief Justice Taney had succeeded Marshall three cases were decided that represented a turnaround from decisions of the Marshall Court. The constitutional provisions under consideration were the same, but the "constitutional politics" was different. The "unyielding conservatism" (Albert Beveridge's term) and nationalizing politics of Marshall had been replaced by the more flexible, state-friendly politics of the Taney Court. By January of 1841, according to Charles Warren, "[S]o fully had [President Andrew] Jackson's appointees on the Court satisfied the country, that political criticism of its decisions had almost entirely disappeared." [2 C. Warren, The Supreme Court in United States History, 1922, at 341] From 1868 to 1890 the Supreme Court interpreted the due process clause of the 14th Amendment so as not to restrict state legislation. From 1890 to 1937, the Court found it a handy weapon of political restraint on state legislation. After 1938 the Supreme Court restored economic due process to its earlier dead letter status. And even the conservative Hughes Court of the Nine Old Men made no fetish of "framers' intent." In a case involving a Minnesota mortgage moratorium law in 1934, during the depression years, the Court seemed to concede that barring such a suspension of mortgage payments had been the very intention of the framers of the "obligation of contracts" clause of the Constitution. [Home Building & Loan Ass'n v. Blaisdell, 1934]. In a familiar passage Chief Justice Hughes found the framers' intent was no bar to upholding the state law: "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning--'We must never forget that it is a constitution we are expounding.' [McCulloch v. Maryland, 1819]." These examples of constitutional politics antedate the Warren Court upon which Judge Bork centered his chief complaints prior to the Burger Court's abortion decision.

The Supreme Court's constitutional decision-making has displayed various "brands" of politics: federalism politics, separation-of-national-powers politics, fair-trial politics, race and sex politics, democracy politics (voting cases), consensus politics, national stability politics, a politics of moderation or compromise, and occasionally a "public opinion" politics. Lord Bryce observed that "The Court feels the touch of public opinion." There is also in constitutional decision-making what might be called a politics of institutional respectability that encompasses coherence and consistency, the limited constitutional counterpart of stare decisis (the common law policy of ordinarily adhering in previous decisions). As I shall suggest, Judge Bork rejects all but this last, which under the direction of "framers' intent" and "neutral principles" becomes his constitutional meter bar. When President Reagan enthuses that Bork "believes his role is to interpret the law, not make it" (July 6, 1987), and that "judges preferences and values shcuild not be part of their constitutional interpretations" he is, unfortunately, figmenting a constitutional world that never was. Moreover, he is proposing a judicial model that is calculated to achieve his (and presumably Bork's) social (or political) agenda.

The "politics thesis" which I have just described documents how our constitutional system has actually operated. This description is a first step, but only a preliminary to the vigorous current debate on how the constitutional system should work. But it is indisputably historical truth to say (with Justices Jackson and Cardozo) that, from the beginning, the Supreme Court has acted "politically" in pronouncing "constitutional law." We might say that the Supreme Court's process is constitutional politics; its product is constitutional law. It has happened this way across two centuries-- with results that have been sometimes good and sometimes horrible. Indeed, the breadth of possibilities within reach under the Constitution poses to each Justice, and to each Supreme Court as the sum of its parts, the question: "What kind of country do I want this to be?" Political choices often have predictable political consequences. There is little room to hide.

Until the recent past the Supreme Court has been deeply involved in decisional politics that was either indifferent to, or partial to, slavery or racial discrimination (which Justice Stewart called a "badge of slavery.") I have already noted Justice Powell's sorrowful acknowledgment of this fact. Unlike Judge Bork (see p. 9 below), I dislike referring to doctrinal adversaries or erring Justices (or Presidents) as racists. However, I believe that a nominee for Justice loses credibility if his constitutional positions or abstaining methodology (even if later recanted) show a "blind spot for blacks" (Professor David Currie's phrase for Chief Justice Taney) or for women. I shall try to show here, I hope fairly, why I believe that Judge Bork does not meet this test.

Until recent years Chief Justice John Marshall has escaped significant criticism for insensitivity to issues allied to the Constitution's compromises with slavery. Yet Charles Warren's first edition in 1922 documented [at p. 86] Marshall's unwillingness to concern himself with racial deprivations. Marshall wrote Justice Story that their colleague, Justice Johnson, while sitting on circuit in Charleston, held unconstitutional a South Carolina statute that required free black seamen debarking in that state to be jailed immediately. "We have its twin brother in Virginia," wrote Marshall; "a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."

Marshall's successor, Roger B. Taney, once a slaveholder in Maryland, enjoyed no such immunity as to his pre-Court career. Taney's biographer, Carl Swisher, quotes from his 1832 opinion as Attorney General of the United States: "The African race in the United States even when free, are every where a degraded class and exercise no political influence....They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term citizens. And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken." Taney's opinion for the Court in Dred Scott (1857) restated these same views. Still, Taney's earlier leadership of the Court prompted a recent historian-critic of slavery and the Scott decision to write: "Had the Taney Court retired on its laurels in 1856, it would surely have gone down as one of the most popular and effective Courts in our history. Taney's tactful leadership, his simple eloquence, and the clarity of his legal mind would have assured his reputation as a worthy successor to the great Marshall." In a law school lecture before joining the Supreme Court for the second time, Chief Justice Hughes marked the Dred Scott decision as the worst of the Supreme Court's three "self-inflicted wounds". Yet in the same lecture he did much to rehabilitate Taney. David Currie, a University of Chicago law professor, pays high tribute to Taney in a recent study (The Constitution in the Supreme Court (1789-1888), but sadly recalls "Taney's blind spot for blacks." As Justice Powell intimated in my earlier reference to Fullilove (1980), Taney was not the last Justice, nor Taney's Court the last Supreme Court, to display a "blind spot for blacks."

The first Supreme Court decision interpreting the 14th Amendment, Slaughter-House Cases (1873), identified the chief purpose of that post-Civil War Amendment as repairing the ravages of slavery. Yet only ten years later, in the Civil Rights Cases, the Court struck down the Civil Rights Act of 1875 (eliminating racial discrimination in certain public accommodations), by severely restricting the enforcement clause of the Amendment. What had happened on the Court between 1873 and 1883? Historian C. Vann Woodward makes a powerful case for what he calls the Compromise of 1877, and his analysis has been recently supported by constitutional historians Harold M. Hyman and William M. Wiecek, and by law professor John Orth of the University of North Carolina.

In the presidential election of 1876, neither Republican Rutherford B. Hayes nor Democrat Samuel J. Tilden received a majority of the electoral votes. An Electoral Commission of fifteen members was agreed on to determine the accurate counts of disputed electoral votes in four states. Five members of the Commission were Senators and five Congressmen, evenly divided according to party. Five members were to be Justices of the Supreme Court. Four of these were named at the outset, and were to choose the fifth Justice. They chose Justice Bradley. Citing Bradley correspondence, Orth writes: "Given the composition of the Commission the fifth judge would decide the outcome....His pivotal position on the Electoral Commission put Bradley in the eye of the political storm. It was later reported--and he [Bradley] never denied it-- that he had actually written out an opinion giving the election to Tilden. In the end, however, he closed ranks with his fellow Republicans and declared Rutherford B. Hayes President-elect." According to Hyman and Wiecek, "The price of southern acquiescence included the Republicans' commitment to end Reconstruction; to withdraw the remaining troops from the South...; and to cease enforcing civil rights laws including the brand new one of 1875." Woodward's criticism of the Supreme Court's 1883 decision in the Civil Rights Cases was pointed: "The

decision constituted a sort of validation of the Compromise of 1877...." That case had declared unconstitutional the last civil rights act until 1957. In the interim Senate filibusters had prevented civil rights bills receiving a floor vote.

What followed the 1883 Civil Rights Cases is history undisputed: the withdrawal of troops, ever-increasing official racial discrimination, and the constitutionalization of Jim Crow under the "separate but equal" formula of Plessy v. Ferguson (1896). And Jim Crow was the constitutional law of the land until in Brown v. Board of Education in 1954. It has been suggested that no evidence of racism surrounded the Compromise of 1877 (and its consequences on the Court). It may well be true that its true motivation was restoration of peace between the North and the South. (Similarly, defenders of Marshall and Taney insist their aim was not racist, but maintaining the Union.) But Justice John Marshall Harlan, the elder, in both the Civil Rights Cases and in Plessy v. Ferguson, predicted the accompanying regressive effect of those decisions on the new black citizens. Once again, with whatever motivation, the Supreme Court decisions revealed a "blind spot for blacks" with frightful national consequences.

There is no evidence at all that Judge Robert Bork is racist-- or sexist--, nor is any such suspicion intimated here. However, particular constitutional positions he has taken, and his basic theory of judicial nonintervention in support of minority and women's claims of right are fully documented. To put it most mildly Judge Bork's published record on these issues leaves substantial grounds for concern that he has a "blind spot for blacks" and women.

I defend Robert Bork's right in 1963 (but not his racial sensitivity) gratuitously to argue the unconstitutionality of the public accommodations section of the bill that became the Civil Rights Act of 1964. I am troubled, of course, that nine years after Brown v. Board of Education he found this core provision outpointed by white persons' right of mutual association. Similarly, I respect the sophistication of Bork's two articles hostile to affirmative action in The Wall Street Journal. In the first (Oct. 28, 1977), before the Court's decision in Bakke, he argues in defense of white equality that "the concept of equality is fundamental in our political system." His new position broadened (at the expense of remedial relief to blacks) his 1971 position that the equal protection clause of the 14th Amendment "was intended to enforce a core idea of black equality against governmental discrimination." Bork added that "much more than that cannot properly be read into the [equal protection] clause."

In his second article (July 21, 1978), after the Court's Bakke decision, Bork applauds the Court's admission of "The courageous and badly treated Bakke," and the defeat of "the hard-core racists of reverse discrimination." However, he finds Justice Powell's controlling opinion "that the 14th Amendment allows some, but not too much, reverse discrimination" to be "an uneasy compromise resting upon no constitutional footing of its own." On his retirement, Justice Powell identified his Bakke opinion formula, which salvaged "not too much" affirmative action, as his proudest work, one which the Supreme Court majority had ultimately accepted four times in 1986 and 1987.

Bork, of course, denies that he is concerned with results, merely with principles. This led him to a formulation of the equal protection clause of the 14th Amendment that excludes relief based upon sex. In his major 1971 article on Neutral Principles and Some First Amendment Problems Bork finds only two meanings in the equal protection clause of the 14th Amendment: formal procedural

equality, and that "government not discriminate along racial lines." Discrimination because of gender is unprotected because "The bare concept of equality provides no guide for courts," and "The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." (1971 article) This formulation, of course, completely excludes the special protection that the Burger Court has recognized against discrimination on the basis of sex.

Similarly, Bork's postulate of "neutral principles" excludes protection against racial discrimination that is not clearly the result of governmental executive or legislative action. In the leading case of Shelley v. Kraemer (1948) the Supreme Court considered the constitutionality of judicial enforcement of racially restrictive covenants on private property. The Court held such enforcement unconstitutional, finding that the judicial action constituted the governmental participation required since the Civil Rights Cases. Because judicial enforcement does not constitute "state action" in all cases, it violates the requirement of "neutral principles" to give it "state action" status in cases involving racially discriminatory restrictive covenants. The "neutral principle" model, as proposed by Bork is not racially motivated, but as applied to the Shelley situation it would reinstate one of the most odious of racial discriminations against blacks.

Some argue that Bork's views on Shelley and racial covenants are not likely to be accepted by the Court. (Newsweek, Sept. 14, p. 28), and that his public disagreement with the Court decision outlawing the poll tax is irrelevant in view of the 24th Amendment abolishing the poll tax. These views, however "principled", kindle serious doubts as to the "blind spot" question. No serious person can say that Bork's public resistance to affirmative action is unlikely to affect the Court's decisional process. Justice Scalia has already weighed in with votes against affirmative action in accord with his pre-Court views. A ten-year dialogue on the Court was finally resolved in 1986 and 1987 with majority decisions upholding moderate use of racial and sexual goals in employment as remedies for past discrimination. The Court reached the conclusion by narrow margins, 5-4 votes that mirrored in the end the qualified support given affirmative action in Bakke in 1978. In that case a broad affirmative action plan in a California state medical school was held unconstitutional. Justice Powell's controlling opinion admitted Allan Bakke, but granted that under certain limited circumstances remedial racial goals could be constitutional. A pre-hearing article in Newsweek relates that "the White House is careful to point out" that "In recent years Bork has neither said nor written much on the subject." Bork has never repudiated his two articles in The Wall Street Journal, one before the Bakke decision (Oct. 28, 1977) and one after (July 21, 1978). The pre-Bakke article counseled the Court to avoid constitutional resolution of the issue. The post-Bakke article criticized what Bork called "the hard-core racists of reverse discrimination". He then declared that the reasoning of the four Justices who joined Justice Powell in leaving open the door to limited affirmation action "offends both ideas of common justice and the 14th Amendment's guarantee of equal protection to persons, not classes." And to Bork the "softer policy of affirmative action" (the Powell opinion) is "at bottom a statement that the 14th Amendment allows some, but not too much reverse discrimination" and "must be seen as an uneasy compromise resting upon no constitutional footing of its own." Whatever one's personal views of affirmative action (and public opinion polls register majority opposition), no serious reader of these two articles can fail to conclude that Bork's pre-hearing views oppose the "softer" remedial affirmative action that the Court has allowed blacks and women.

Bork's expressed views on affirmative action attest to the very real likelihood that his vote would turn the Court away from its painstaking resolution in 1986 and 1987 in favor of the "softer" Powell view. Justice Scalia had expressed views similar to Bork's before joining the Court, and in the two crucial affirmative action cases this year (one involving blacks, the other women), as expected, he dissented.

A majority of the Supreme Court did not coalesce on the standards for permitted affirmative action plans as a remedy for racial discriminationon until the Sheet Metal Workers case in 1986, and did not extend this analysis to discrimination in employment against women until 1987. The story of how the Supreme Court reached its conclusion over the resolute opposition of the Reagan-Meese Department of Justice is too easily forgotten. In 1985 the head of the Justice Department's civil rights division, William Bradford Reynolds, took steps to reopen consent decrees in 50 jurisdictions to eliminate provisions for numerical goals for hiring of minorities and women. The Senate, that same year, took the unprecedented step of rejecting his nomination by the president to the No. 3 post in the Justice Department. Shortly thereafter, in August 1985, Attorney General Meese leaked a draft revision of a 1965 presidential executive order that required government contractors to meet minority hiring goals or face losing government contracts. Apparently Meese was directed to bring the matter to the cabinet. When the proposed revision was subjected to cabinet discussion in October 1985 it met unexpected opposition. Press accounts listed Labor Secretary Brock as strongly opposed, and identified Secretaries Shultz, Dole, Pierce as also opposing Meese's plan. (Wash. Post, Oct. 25, 1985). Unexpected support for the hiring goals was also voiced by business interests, and the Meese proposal was dropped.

Meanwhile, the Supreme Court had agreed to review of three Court of Appeals decisions affirming racial hiring goals, and the Solicitor General submitted briefs in opposition to them. In the first of these cases to be heard and decided, the Court reversed the lower court decision upholding the plan. The majority opinion by Justice Powell held that the affirmative action plan in question was excessive, but indicated continued Court support for a less exacting plan. The Justice Department's position in the Sheet Metal Workers case was particularly peculiar, because the Equal Employment Opportunity Commission (EEOC) had won the court-ordered racial remedy at trial and had successfully defended the racial goal remedy in the Court of Appeals. Repeating a tactic it had used in 1982, in the Bob University case, the Meese Department of Justice declined to defend in the Supreme Court the decree won by the EEOC below. Instead, civil rights division head Bradford Reynolds, arguing in the Supreme Court for the United States, asked the Supreme Court to reverse the decree won by the government agency in the Court of Appeals. Defense of the affirmative hiring goal remedy was left to the New York State Division of Civil Rights, which had been a minor party in the case. Among the friend of court briefs filed in that case were two of particular significance. The National Association of Manufacturers weighed in strongly in support of the racial goals decreed by the lower courts: "[I]n addition to providing employers with a flexible means of affecting voluntary compliance with Title VII [of the Civil Rights Act of 1964], the use of employment goals has been a valuable tool ro promote equal employment opportunities for minorities and women....NAM supports the use of flexible goals after a finsding of discrimination as an appropriate remedy which contravenes neither the remedial limits of Title VII nor the

Constitution." [NAM Brief, pp. 17, 7] And the American Jewish Committee joined with a group of other Jewish organizations in a brief supporting the use of race-conscious "numerical remedies," and rejecting the Reagan Administration's effort in Sheet Metal Workers "to label 'quotas' any and all affirmative numerical [racial] remedies." [Brief, p. 9] The case marked a significant reunion of former civil rights allies who had resolved previous differences as to the permissible extensiveness of numerical racial goals and timetables as remedies for past discrimination. Administering a resounding rejection of the Reagan-Meese-Reynolds Justice Department position, the Supreme Court in Sheet Metal Workers for the first time packaged a majority--just 5-4-- in favor of judicially ordered remedial racial goals. In 1987, the Court twice again rejected the Department of Justice position opposing remedial affirmative action. In Paradise the Court affirmed a Court of Appeals decision that upheld court-ordered racial goals in promotions as a remedy for egregious racial discrimination in Alabama's state police. And in Johnson the Court (this time joined in its conclusion, but not its analysis by Justice O'Connor) upheld a sex hiring goal that had been adopted voluntarily by a California county department. Although the Court's test, as before, was strict, its downward inflection against the Department of Justice intransigence was evident. There were now five decisions in two years in which the Supreme Court had, in the words of the New York Times legal correspondent "shredded legal objections raised by the Reagan administration and by white men." (N.Y.Times, Mar. 27, 1987, p. 1).

The official spokesman of the Justice Department, Terry Eastland, was asked after the second 1987 rebuff how the Administration "might hope to regain the ground it has lost in the last five decisions." His reply was: "A new appointment or two" . (N.Y.Times,Mar. 27, 1987, p. 10).

This authoritative statement was never repudiated by Attorney General Meese or President Reagan (although Solicitor General Charles Fried stated that he found it "deeply troubling") (N.Y.Times, Mar. 28, 1987, p. 1). Couple this with the President's recent prepared statement that "On the domestic side we face one more important task, and no more important task, I should say, than securing the confirmation of [sic] the Supreme Court of Judge Robert Bork." (N.Y.Times, Sept. 9, 1987, p. 13). Together these comments give credence to the suggestion that Bork is a political instrument. One recalls Clausewitz's definition of "war" as continuation of policy by other means." The Administration's design to make make the Supreme Court party to its "blind spot for blacks" reinforces Bork's personal vulnerability on this same ground. The insensitivity is underscored by the President's bid for Bork's confirmation as his own personal "good curtain call." (Id.)

This is not to say that the President is acting beyond his constitutional power. His Attorney General and his assistants (Reynolds and Eastland) attack the Court and even an individual member (Justice Brennan). The Attorney General admits soliciting from federal judicial prospects their stand against "judicial activism", a code word for the congeniality to individual rights that the Court has shown the past 40 years. (Wash.Post, Feb. 5, 1987, A4.) The President campaigns on the perils of a Democratic President (1984) or a Democratic Senate (1986) having a hand in crucial nominations to the Supreme Court. When the opportunity is presented he appoints respectable nominees, like Judge Bork, who represent most closely his political and social program. All this is constitutional --and highly political. The question arises whether the Senate has been equally "conscientious" in its constitutional "advise and

consent" function. Not until the President's bid for a Republican Senate came up short in 1986 did the Judiciary Committee take full account of the Senate's constitutional responsibility to forestall continued presidential "mugging" of the federal judicial system. By that time President Reagan had nominated only five blacks to 291 federal judgeships in six years (1.7% of his judicial nominees, compared with President Carter's 20% blacks). Women did somewhat better (Reagan's 9.4% compared to Carter's 15%). Asked to explain the black judicial shortfall at Reagan's hands, Meese told the Senate Judiciary Committee that few blacks were Republican: "Party registration would have something to do with it, as far as particular minority groups are concerned." (Wash.Post., Feb. 5, 1987, A4).

President Reagan asked the American people in the campaign of 1986 to return a Republican Senate to insure his ability to appoint "my kind of guys" (not Reagan's language) to the prospective vacancies on the Supreme Court. The people said "No." And that was before they had knowledge of the Iran-Contra affair. No one knows better than the members of the Senate who were unexpectedly retired by popular vote in 1986 how crucially the electorate's rejection of the "blank check" Supreme Court appointments issue figured in their defeats.

Robert Bork is the nominee par excellence from the standpoint of mirroring the Administration's criterion of opposition to judicial activism. In fact, one could fairly say that he is one of the last surviving originals, even the role model of Reagan-Meese constitutional jurisprudence. Yet even his aware supporters are forced to acknowledge that the framers themselves (the first Congress) included in the Bill of Rights of the Constitution the 9th Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Yet, according to Judge Bork "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution." (1971 article, pp. 10-11).

One can agree with Judge Bork on certain important constitutional issues (as I do on abortion), and even recognize his capacity to contribute on the important but second level court where he now sits. One can even say that his Watergate "Saturday Night Massacre" firing of Archibald Cox should be mooted by the Senate's earlier approval of his nomination to the lower federal court. Still one can conclude (as I do) that his confirmation by the Senate as swing Justice on a closely divided Supreme Court could be a national disaster. Of course he could change and not act out the "blind spot for blacks" and women when he gets to the Court. One hopes that the Senate will not live that dangerously.

The question is not Republican or Democrat, liberal, conservative, or ultraconservative. It is in the end "What kind of country do I want this to be 'under God' and the Constitution?" The nation has survived 78 years of slavery, one race-rooted civil war, and about 87 years of Jim Crow. After 200 years at least the majority of black citizens are still substantially disadvantaged economically. In his well-known study, The Zero Sum Society, 1980, Lester Thurow cites familiar statistics with respect to black unemployment, and concludes that "[b]lack unemployment has been exactly twice that of whites in each decade since World War II" and that without affirmative action relief "there is nothing that would lead anyone to predict improvements in the near future." (at p. 185). We went through 133 years in which women could not even vote, 177 years in which they were subject to legal discrimination at the workplace, and

roughly 184 years in which they were beyond the reach of "equal protection." To all of these disabilities the Supreme Court's "constitutional politics" --in its worst phases--has contributed. The turnaround started only a generation ago (with Brown in 1954). The Court did not even begin to deal with sex discrimination until the 1970's.

With so little yet accomplished and so much to be done to make possible the goal of "justice" proclaimed in the Constitution's preamble, the nation voted in 1986 to hold to the "spirit of Brown". It is no time for the Senate to risk placing on the Court a "charming" jurist with a "blind spot for blacks" and women.

These concerns would form my conscience were I voting in the Senate on the nomination of Robert H. Bork. I hope my Senator agrees that there is no place for a Compromise of 1987.

Massachusetts Lawyers Weekly, September 7, 1987

VIEWPOINT

Controversy Over Bork's Nomination No Surprise

This commentary represents the viewpoint of one attorney on an issue of interest to lawyers and judges in Massachusetts. It does not represent the opinion of Lawyers Weekly or its Board of Editors. We invite readers to submit for consideration their viewpoints on other law-related issues.

By Harold Brown

Issues raised by the nomination of Judge Robert Bork to the U.S. Supreme Court permeated much of the formal and informal activity of the 1987 ABA Annual Convention in San Francisco. The 200th anniversary of the Constitution was the keynote for the six "Showcase" programs, giving ample opportunity to focus on the Senate's role of "advice and consent." The nomination stirred intense and sometimes bitter controversy.

There were many who subscribed to the "conventional thinking" that Judge Bork is both highly qualified and of impeccable character; that the Senate's role of "advice and consent" should not go beyond those two standards; and that the executive is fully entitled to enhance his conservative political program in exercising a constitutional prerogative. The principal complaint was that Bork's confirmation would create a majority bloc of conservatives that would endure well into the next century.

Legal scholars traced the developments of judicial selection and confirmation during the formulation of the Constitution and through its 200-year history. During the crucial six months before the actual adoption of the Constitution, the "judge" issues went through several important changes. At first, the House of Representatives was assigned the exclusive prerogative of both nomination and confirmation. Feeling that such a process could become unwieldy because of the large number of representatives, the framers shifted both powers to the Senate. Twice during that summer, unsuccessful motions were made to allow the president to nominate judges, but to retain the need for Senate consent. Just before final approval of the entire constitutional proposal, the current formula was again proposed and speedily adopted without significant debate. "Advice and consent" therefore did not acquire any extensive legislative history. Until the last moment, the Senate had the full responsibilities of selection and confirmation.

History of Controversy

Historically, close to 30 Supreme Court nominees have been rejected, while one sitting justice failed to obtain Senate approval to become chief justice. The worst experience was during the period from 1844-74 when half of the nominees failed to obtain Senate approval. The consensus is that such wholesale politicking did a great deal to weaken the prestige of the court. In more recent times, Judge Parker was rejected during the 1920's because of perceived prejudice against labor and blacks, though later history tends to question the propriety of that appraisal. Confirmation of Louis Brandeis was held up for over a year while Senate debate raged on such issues as alleged conflict of interest and anti-semitism. Similar debate surrounded the appointment of Chief Justice Hughes. In the end, both were confirmed. In order to obtain California's support for his nomination, President Eisenhower appointed Earl Warren as chief justice. More recently, it is claimed that President Johnson nominated Justice Fortas because he was a buddy. Notably, however, almost no one has challenged the legal acumen of any of these justices. In fact, each of

them was far more talented than many mediocre performers.

Commentators have noted that where there has been ideologic opposition, this has usually been masked in other terms. The same may be asserted against purely political or personal selections, especially since the use of that standard could evoke a cycle of revenge by succeeding political parties. If nominees are to be challenged on ideologic grounds, the argument goes, the basis for approval could descend into bland appointments of those with no recorded history of their views on the crucial issues of the day. Further, cross-examination on ideologic grounds could debilitate the nominee and impugn his later functioning.

All of these platitudes have a measure of support, both as a matter of history and logic. It is nonetheless felt by many that the Senate Judiciary Committee is entirely within proper bounds in seeking academic and professional review of the many issues on which Judge Bork has publicly declared strong positions that run contrary to extant Supreme Court rulings. According to Sen. Joseph Biden, chairman of the Senate Judiciary Committee, these task forces will report on the candidate's judicial philosophy and his competence as a judge.

Question Of Balance

Impartial observers note that the basic issue stems from the fact that there are already four sitting justices on the far right of the political spectrum. In this sense, a negative Senate vote would not necessarily mean that the condidate is "unfit," but rather that his confirmation would create an imbalance of long duration. To illustrate, it is universally conceded that Judge Bork's nomination would not have been questioned if it had occurred before Justice Scalia's appointment. Many commentators have been puzzled as to why Bork had not been previously nominated. And some have wondered about the consequences that might follow the rejection of Bork's nomination. It is generally speculated that if Bork is not confirmed in the present session, the president is not likely to give Bork an interim appointment.

In asserting its explicit constitutional prerogative of "advice and consent," the Senate would exercise its co-equal role in a crucial segment of government. Indeed, the history of the Constitution originally granted the entire role to the Senate and, only at the last moment, a share of that power was assigned to the president. The delicate task of "checks and balances" in a tripartite government does not mean that one segment should abandon its assigned task. Significantly, the Senate has always exercised a substantive role of real evaluation where its "advice and consent" are mandated for the ratification of treaties negotiated by the executive.

The fact is that both the executive and Congress are very much political animals. In his waning period as a lame-duck, the current executive has diminished political punch even in his own party. He has publicly declared that his program for the remaining 18 months is to balance the budget, to reduce the deficit and to secure the confirmation of Judge Bork so that his conservative program will endure beyond the end of this century. The latter part of that public declaration precisely designates the scene as battle. He and his supporters have loudly declared that the electorate has forcefully spoken in his nearly unanimous reelection in 1984. Those who support that view conveniently overlook the fact that in 1986, the same electorate overwhelmingly elected a Democratic Senate, the very body whose power is now in question.

Election Issue

In the long run, politics may very well provide the ultimate answer, since this constitutional issue will not be decided in a judicial proceeding. One third of the Senate will be up for election in exactly one year. Every member of that body is exquisitely aware of the fact that without reelection, political life is moribund. Each senator is fully aware of the fact that the president's two goals of "balancing the budget" and "reducing the deficit" will not stir the emotions of the public. It is obvious that the ratification of Bork's appointment will occupy center stage in the months between now and the next election.

In the nation, much is being said about that. Amost immediately after the Bork nomination, the appointment was challenged by many important segments of the electorate. First came the almost unanimous vote of the NAACP, shortly followed by the AFL-CIO, then the National Teachers Association, the National Organization for Women and many others too numerous to list. The mayor of Gary, Ind. declared that "the Bork nomination is such an affront to so many groups that it will bring together people who may not normally align for a cause."

It is doubtful that any borderline Senate candidate will choose to confront such a unique swelling of public opinion, even though many right-wing conservative groups will undoubtedly join the fray. As in many comparable situations, the Senate may prefer extended delay.

The country has yet to learn the full extent of some of Bork's controversial views. He has claimed to be a "strict constructionist" who sticks close to the written Constitution and declared congressional intent. While he abhors an "activist" judiciary, he has repeatedly declared his unwillingness to adhere to congressional declarations regarding the enforcement of the antitrust laws. He has publicly attacked the unanimous 1925 U.S. Supreme Court decision that effectively applies the federal Constitution to the states, thereby undermining the separation of church and state as applied to the states. He has consistently challenged Supreme Court decisions on abortion, on affirmative action for blacks and other minorities, on the Equal Rights Amendment, on the "right to privacy," etc. It is no wonder that large segments of the population are literally up in arms against Judge Bork's appointment to the Supreme Court at this time. Underlying their deep resentment is the universal recognition that these constitutional preemptives have been hammered out by a Supreme Court that can hardly be said to be dominated by a "liberal and activist fringe."

Given these considerations, it is clear that the nomination of Judge Bork has already evoked a unique response through a broad spectrum of the nation. No matter what the result may be, the debate will be long and it will be acrimonious. To the degree that the government depends on the "consent of the governed," this appointment will predictably reach crisis proportions. Those affected by Judge Bork's judicial philosophy can hardly be expected to do less.

[*Editor's Note: Harold Brown has his law offices in Boston, where he concentrates in antitrust and franchise law. He is a member of the Lawyers Weekly Board of Editors.*]

BPW usa

The National Federation of Business and Professional Women's Clubs, Inc. of the United States of America

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(202) 293-1100

October 2, 1987

Honorable Joseph Biden
Chair, Senate Judiciary Committee
Russell Office Building, SR-489
1st & C Streets, N.E.
Washington, DC 20510

Dear Senator Biden,

On behalf of Business and Professional Women's Clubs/USA, I am submitting our testimony in opposition to the confirmation of Robert Bork as Associate Justice of the United States Supreme Court and a two page extract of that testimony for the record. Copies of this testimony are being provided to each of your Senate colleagues.

As the oldest and largest organization advocating the interests of working women, BPW's 3,200 delegates at their annual convention this past July voted overwhelmingly to oppose the nomination of Judge Robert Bork to the Supreme Court. The full basis of our opposition to the nominee is set forth in the attached statement of BPW's National President, Beth Wray.

I would like to emphasize that it is extremely rare for this bipartisan organization which focuses primarily on economic issues affecting women to take a position on a judicial nomination and to become actively and aggressively involved in a lobbying effort to oppose such a nomination. We have done so because we believe that Robert Bork poses a substantial threat to the guarantees and gains that women have made thus far in their legal status and because his views of antitrust law, as expressed through legal writings, speeches and court decisions, are inimical to the interests of small business and consumers. More than 1/3 of our members are owners or employees of small businesses and many others are business women whose income is dependent upon the health and viability of small businesses within their communities.

If there are any questions, please feel free to contact myself, Monica McFadden, Director of Government Relations and Public Affairs or her assistant Carol Miller.

On behalf of the working women of America, Business and Professional Women/USA urge that you defeat this nomination.

Respectfully submitted,

Linda Colvard Dorian

Linda Colvard Dorian
Executive Director

Enclosure

cc: United States Senate

SUMMARY OF TESTIMONY

The National Federation of Business and Professional Women's Clubs, Inc. (BPW/USA) has submitted testimony to the Senate Judiciary Committee urging the Committee and the Senate to withhold its confirmation of Judge Robert Bork as an Associate Justice of the Supreme Court.

BPW is the oldest and largest professional women's organization in the United States. Our members are business and professional people in every state and the District of Columbia, Puerto Rico and the Virgin Islands. Since 1919, BPW has worked to improve educational, work and other economic opportunities for women.

Members of BPW voted overwhelmingly at our national convention in July to oppose Judge Bork's elevation to the Supreme Court. We believe that Judge Bork's public statements, academic and other writings and judicial decisions indicate that he has strongly held views which, if reflected in Supreme Court decisionmaking, would have a serious negative impact on working women and the country. His narrow construction of statutory and constitutional provisions concerning individual rights raise substantial doubts about his respect for congressional intent and judicial precedent and his understanding of the needs of the nation for an evolving Constitution. Judge Bork has made clear that he would take an extremely activist role in imposing his views of the antitrust laws, ignoring both decades of court precedent and clear congressional intent to the contrary. His views, if adopted, would harm small business and jeopardize the continued advancement of women in business and the professions.

Judge Bork has written that the only valid purpose of the antitrust laws is the promotion of his version of "economic efficiency". The manner in which Judge Bork has interpreted the antitrust laws and the way he has indicated he would apply them are inconsistent with nearly a century of cases decided by the Supreme Court and with the intention of Congress in passing these laws. He would allow a number of business practices which have been held illegal for decades. He would reject any consideration of the non-economic legislative goals of the antitrust laws, which the Court has acknowledged, including the encouragement and protection of small business, limiting the concentration of big business and minimizing the abuse of power by powerful business.

We are concerned about the impact of Judge Bork's antitrust views through future Supreme Court decisions on small business and the economy. By focusing only on "economic efficiency" in the application of the antitrust laws, Judge Bork would remove legal protection that enables new businesses to enter into the market and helps small, innovative enterprises develop. He rejects the prevailing theme of antitrust cases throughout this century that the temporarily small, sometimes less efficient

operator should not be totally at the mercy of its bigger more powerful competitor.

We are also concerned that Judge Bork's theoretical approach to problem solving may lead to the unwise resolution of cases and again, harm small businesses and women. Judge Bork's position on the antitrust laws is premised on a model of perfect markets and efficiencies within such markets which we do not believe accurately reflects how businesses operate in the real world. The members of the Supreme Court, the final arbiters of the antitrust laws, cannot ignore the fact that such imperfections in the market exist and thus impair the ability of small businesses to compete.

We believe that Judge Bork's antitrust views would also harm consumers. Judge Bork would permit resale price maintenance - a supplier fixing the price at which distributor may sell the supplier's goods - thereby precluding a distributor from offering discounts to consumers. Furthermore, when Judge Bork rejects "non-efficiency" goals of the antitrust laws, such as maintaining small locally owned business, he casts aside values that are important to consumers.

Our members also oppose Judge Bork's nomination because of his narrow and restrictive views on the constitutional and statutory protection for women. We are fearful and uncertain whether he would protect our fundamental rights and liberties under the Constitution. With this uncertainty, Judge Bork's elevation to the Court would put at risk the legal framework which has ensured women access to education and employment opportunities which are essential to their economic well being.

Finally, we fear that Judge Bork is a judicial activist masquerading as a believer in judicial restraint. Despite Judge Bork's stated reliance on "original intent," "neutral principles" and judicial restraint, his judicial philosophy, as reflected in his antitrust writings, permits the imposition of his theories of what the law should be, despite congressional intent and significant judicial precedent to the contrary.

As business and professional women we look to the Supreme Court as the ultimate arbiter and protector of our fundamental rights and liberties as well as the guarantor that the laws passed by Congress will be enforced. Judge Bork's changing views on important issues undermines our confidence that the law will continue to afford basic protection to women and small business.

We do not believe that the Judiciary should consent to placing on the Supreme Court an individual whose judicial philosophy and views pose so much risk. Therefore, we have urged the Judiciary Committee and the Senate to withhold its confirmation of Judge Bork's nomination.

Mr. Chairman and Members of the Committee, my name is Beth Wray, President of the National Federation of Business and Professional Women's Clubs, Inc. (BPW). It is an honor and a pleasure for me to present testimony to the Committee concerning the nomination of Robert H. Bork to be an Associate Justice of the Supreme Court.

BPW is the oldest and largest professional women's organization in the United States. Our members are business and professional people in every state and the District of Columbia, Puerto Rico and the Virgin Islands. Since 1919, BPW has worked to improve educational, work and other economic opportunities for women. With such opportunities, women can take a fuller role in business and the professions, become economically self-sufficient and contribute further to the economic growth and social development of this country.

Members of BPW voted overwhelmingly at our national convention in July to oppose Judge Bork's elevation to the Supreme Court. We believe that Judge Bork's public statements, academic and other writings and judicial decisions indicate that he has strongly held views which, if reflected in Supreme Court decisionmaking, would have a serious negative impact on working women and the country. His narrow construction of statutory and constitutional provisions concerning individual rights raises substantial doubts about his respect for congressional intent and judicial precedent and his understanding of the needs of the nation for an evolving Constitution. Judge Bork has made clear in both his academic

writings and his court decisions that he would take an extremely activist role in imposing his views of the antitrust laws, ignoring both decades of court precedent and clear congressional intent to the contrary. His views, if adopted, would harm small business and jeopardize the continued advancement of women in business and the professions.

Judge Bork has written extensively in the antitrust field; it is the area of his most intensive academic authorship. In the Antitrust Paradox [1/] and numerous law review and popular journal articles[2/] he has forcefully reiterated his views regarding the manner in which the antitrust laws should be applied. He disagrees with much of the statutory and case law developments of the antitrust laws for the last century. As he has acknowledged, his writings

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1/ Antitrust Paradox - A Policy At War With Itself (1978).

2/ Emerging Substantive Standards -- Developments and Need for Change, 50 Antitrust Bulletin 179 (1981-82); Antitrust in Dubious Battle, 44 St. John's L.J. 663 (1970); Resale Price Maintenance and Consumer Welfare, 77 Yale L.J. 950 (1968); Legislative Intent and the Policy of the Sherman Act, 9 J. Law and Econ. 7 (1966); The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L. J. 775 (1965); The Rule of Reason and the Per Se Concept: Price Fixing and Market Division - Part II, 75 Yale L. J. 373 (1966); Anticompetitive Enforcement Doctrines Under Section 7 of the Clayton Act, 39 Texas L. Rev. 832 (1961); Vertical Integration of the Sherman Act: The Legal History of an Economic Misconception, 22 U.Chi. L. Rev. 157 (1954); Antitrust and the Judicial Process: The Bench as an Economic Forum, New York L.J. (May 9, 1968); Antitrust in Dubious Battle, Fortune 103 (Sept. 1969); The Supreme Court Versus Corporate Efficiency, Fortune 92 (Aug. 1967); The Crisis in Antitrust, Fortune 138 (Dec. 1963).

provide the theory for substantial reform of the settled body of law as it has developed during nearly a century.[1]

In Judge Bork's view, the only valid purpose of the antitrust laws is the maximization of what he calls "consumer welfare."[2] On its face, such a goal seems laudable. However, the Bork definition of "consumer welfare" is a narrow one which encompasses only considerations of so-called economic "efficiency"[3] resulting in the maximization of profits. In other words, in analyzing the legality of a challenged business practice, Judge Bork would only weigh those factors which he believes are capable of numerical measurement, and would reject any consideration of the other legislative goals of the antitrust laws, including the encouragement of and protection of small business, limiting the concentration of big business and minimizing the abuse of power by powerful business.

Judge Bork's approach would severely limit the use of the nation's antitrust laws to protect competition. It would allow a number of business practices which have been held illegal for decades. For example, under Judge Bork's approach,

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[1] In the Antitrust Paradox Judge Bork "attempt[ed] to supply the theory necessary to guide antitrust reform." Antitrust Paradox at 8.

[2] Antitrust Paradox at 51, 81.

[3] Judge Bork includes "allocative" and "productive" efficiency, i.e., "the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their input most" and "the effective use of resources by particular firms." Antitrust Paradox at 91, fn.

the antitrust laws would permit many horizontal mergers, all conglomerate and vertical mergers, all vertical business restrictive practices (such as resale price maintenance, exclusive dealing contracts and tie-in sales or other limitations on the sale or distribution of products by independent businesses) and price discrimination. While he would still prohibit predatory practices by entities with substantial market power, again, he defines predation so narrowly that it would very rarely be found.[5/]

The manner in which Judge Bork has interpreted the antitrust laws and the way he has indicated he would apply them are inconsistent with nearly a century of cases decided by the Supreme Court and with the intention of Congress in passing these laws. The Court has acknowledged and Congress frequently reiterated the broader purposes of antitrust legislation, including the diffusion and control of economic power and protecting the ability of small enterprises to compete and remain viable.

The intent of Congress, for example, was most clearly stated when it passed in 1950 the Celler-Kefauver Amendments to

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5/ Judge Bork's definition of predation is reflected in his conclusion that "enforcement agencies . . . [have a] harmful habit of seeing predation in behavior that is actually vigorously competitive." Antitrust Paradox at 148. Were Judge Bork able to do so, he apparently would even eliminate the Sherman Act's, clear proscription of monopolization. In his view, "monopoly . . . is not an absolute case, . . . it may . . . rest upon productive efficiency" and thus be beneficial to consumer welfare. Antitrust Paradox at 98.

Section 7 of the Clayton Act, thereby outlawing mergers which "tend" to restrict competition. In those amendments, Congress was indisputably concerned about the substantial concentration of economic power in too few businesses. Judge Bork discounts such "non-economic" goals as "mutually incompatible" and "incorrect".1/ He says they reflect "poor economic understanding" by Congress.1/

The views which Judge Bork has expressed regarding the antitrust laws are the basis of several of our objections to his becoming an Associate Justice of the Supreme Court.

First, we are concerned about the impact of Judge Bork's antitrust views through future Supreme Court decisions on small business and the economy. By focusing only on

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1/ Antitrust Paradox at 7.

1/ Antitrust Paradox at 66. Judge Bork's reading of the congressional intent is significantly narrower than that of the courts and other antitrust scholars and economic historians. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1146-54 (1981); Fox, The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window, 61 N.Y.U. L. Rev. 554, 564-67 (1986); Elzinga, The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?, 125 U. Pa. L. Rev. 1191 (1977); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L. J. 65, 86-106 (1982); Pitofsky The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979); Schwartz, Justice and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979). Judge Bork dismisses language in the floor statements and committee reports concerning the non-economic goals of the Celler-Kefauver Amendments to the Clayton Act in 1950 such as the values of decentralization and trends of increased concentration as "side effects" rather than "criteria" to be used in applying the statute. Antitrust Paradox at 65.

"economic efficiency" in the application of the antitrust laws, Judge Bork would remove legal protection that enables new businesses to enter into the market and helps small, innovative enterprises develop. Judge Bork's analysis would not tolerate the existence of what may be temporarily less efficient businesses which, given protection to withstand the unfair practices of larger competitors may grow into substantial, innovative enterprises. He rejects the prevailing theme of antitrust cases throughout this century that the temporarily small, sometimes less efficient operator should not be totally at the mercy of its bigger more powerful competitor.

If Judge Bork's theories were applied, the small independent business would operate under a greater continuing threat of being eliminated through mergers. The freedom of the small entrepreneur to make fundamental decisions on how best to conduct his or her business would be impaired by the variety of restraints that Judge Bork would allow. For example, Judge Bork would permit resale price maintenance under which a supplier could preclude a small business person from setting his or her price for goods, even if the business person believed that offering a discount on merchandise was essential to the successful operation of the business, and even though consumers would be greatly benefited thereby. If the reforms Judge Bork seeks in the antitrust laws are adopted, small business will suffer.

Second, we are concerned that Judge Bork's theoretical approach to problem solving may lead to the unwise resolution

of cases and again, harm small businesses and women. Judge Bork's position on the antitrust laws is premised on a model of perfect markets and efficiencies within such markets which we do not believe accurately reflects how businesses operate in the real world. He sees a world in which monopolists will not necessarily raise prices, oligopolists make all business decisions independently, and predatory business practices by firms with substantial market power are unlikely to occur. This is not the world that business people know or most students of business behavior understand to exist.

Judge Bork's analysis of the antitrust laws is based on the supposition that "free market" conditions exist. In such a free market, Judge Bork sees, among other things, no barriers for firms, large or small, to enter the market and equal access by all business persons to the capital market. The experience of our members indicates that such an ideal world does not exist. Women-owned businesses are frequently undercapitalized and women often find it more difficult than men to obtain commercial credit. A recent study by the Small Business Administration indicated the difficulties that small businesses and women in business face in obtaining credit. Women must rely on personal savings and family sources of funding more than men.[1/] Some women business owners have

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1/ The State of Small Business: A Report of the President 165 (1986)

reported that where outside capital was made available they had to pay exorbitant interest rates as the price of obtaining such credit.[10/]

The members of the Supreme Court, the final arbiters of the antitrust laws, cannot ignore the fact that such imperfections in the market exist and thus impair the ability of small businesses to compete.

BPW is particularly concerned about the potential impact on small business both because of its membership and because of the consequences for women and the economy if small business is impaired. Over one-third of our members are employed in or own small businesses. Many others serve small businesses as bankers, computer specialists, accountants, and telecommunications experts. Beyond BPW, expansion of small business has meant increased employment opportunities for women and men. A majority of women in the workforce are employed in small business. In addition, growth in the number of small businesses and the increase in their gross receipts in recent

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10/ One female entrepreneur, the founder of Discovery Toys, was required to pay interest of 27.5% on loans and was refused additional credit despite a good credit rating before she was able to establish her successful $40 million toy business. See, Bohigian, Ladybucks-Why Certain Women Turn Work into Wealth (1987.)

years shows that they contribute significantly to the growth of the economy.11/

Third, we believe that Judge Bork's antitrust views would harm consumers. Again, Judge Bork's theoretical view of the world does not comport with reality. Judge Bork's narrow definition and measurement of "consumer welfare" does not take into account factors that real consumers use in determining their own welfare. Judge Bork posits that resale price maintenance - a supplier fixing the price at which distributors may sell the supplier's goods - should be legal because the supplier's "motive cannot be the restriction of output and, therefore, can only be the creation of distributive

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11/ From January through November 1986, there were 633,810 new small business incorporations, an increase of 4.8% over the same period in 1985 when 604,579 new small businesses were incorporated. In addition to the number of new small businesses, the growth in women-owned business and their relative profitability has been substantial. From 1977 to 1983 the number of women-owned businesses increased annually by 9.4 percent, while men-owned businesses increased 4.3 percent. During the same period, the annual growth rate of receipts by women-owned increased at three times the rate of men-owned business. Small business also contributed substantially to job creation and retention and is the major employer of older and younger workers, women and veterans. From December 1985 to December 1986, small business dominated industries provided 1,004,900 new jobs (in comparison to the 97,400 new jobs in big business dominated industries), a gain of 2.93% over the December 1984 to December 1985 period. The State of Small Business - A Report of the President Transmitted to Congress, Appendix A (1986 and 1987 editions.)

efficiency."[11/] He explained in his testimony before this Committee that resale price maintenance should be allowed because, by allowing a supplier to preclude discounting, a supplier is able to ensure that distributors of its goods will provide services to consumers. We question whether the provision of such services maximizes consumer satisfaction where it interferes with distributors offering discounts or lower prices to consumers. We believe that all consumers should have the option of foregoing service in order to obtain merchandise at a lower price.

Furthermore, when Judge Bork rejects "non-efficiency" goals of the antitrust laws, such as maintaining small locally owned business, he casts aside values that are important in evaluating consumer welfare.

The effectiveness of the antitrust laws in maintaining fairness in the market place is in large measure, a result of their prophylactic impact. The limits established by the law and cases enforcing the statutes establish guidelines which businesses violate at their peril. Were Judge Bork to be elevated to the Supreme Court, we fear that businesses that now curb their overly aggressive or anticompetitive practices to conform to these "rules of the marketplace" would feel freer to use predatory business practices against smaller enterprises and risk legal sanctions in the hope that, if the government or

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11/ Antitrust Paradox at 289.

a competitor brought suit against them, the law would be reformed in accordance with Judge Bork's interpretation. This danger to small business should not be ignored.

Finally, and very important in terms of the Senate's obligation to "consent" to his nomination, Judge Bork's writings regarding the antitrust laws, in which he is highly critical of Congress and the Supreme Court, are especially instructive. They raise fundamental issues regarding his view of the role of the courts in interpreting and applying laws and his regard for legislative history and judicial precedent.

In antitrust, as in other statutory enactments, Congress left wide room for the judiciary to define anticompetitive activity. As Judge Bork acknowledges, "the process of antitrust lawmaking has largely been confided to the judiciary."[13/] However, Judge Bork also generally has condemned the "modern tendency of the federal judiciary to arrogate to itself political judgments that properly belong to democratic processes and popular assemblies" in antitrust and "all fields of law."[14/] How then, would Judge Bork have the courts carry out the judicial duty to apply the antitrust law?

Judge Bork's call for policies to be set by legislatures would, it seems, lead judges to examine carefully the intention of Congress to determine the way in which to

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13/ Id. at 72.

14/ Id. at 419.

apply the law. In developing his antitrust theory, Judge Bork does begin with such an examination. However, Judge Bork's selective reading of legislative history leads him to reject the social and political goals clearly underpinning the antitrust laws which he cannot reconcile with his notions of economic efficiency. Despite clear statements of these non-economic purposes by sponsors of the legislation which require looking at other factors, he concludes that the only true intent of Congress was such efficiency (which he labels "consumer welfare"). As we have described earlier, his reading of the legislative history is at odds with the reading of the Supreme Court and other antitrust scholars.[11/]

Judge Bork apparently would have judges look beyond legislative history to their own analysis of what the antitrust laws should provide regardless of what intent the Congress had in passing the laws. He notes that "courts have obligations other than the mechanical translation of legislative will...particularly...with statues as open-textured as the antitrust laws".[12/] While he does not specify what these obligations entail, he makes clear his view that the courts should reform the application of the antitrust law. Accordingly, he would have judges continually evaluate and selectively apply a statute's proscriptions. Judge Bork

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11/ See fn. 8 supra.

12/ Antitrust Paradox at 72.

belittles congressional intent in this area. He concludes that Congress is "institutionally incapable of sustained, rigorous and consistent thought that fashioning rational antitrust policy requires"[17] and that its statements reflect "poor economic understanding."[18] Specific practices which Congress thought injurious to competition and declared illegal in the Clayton and Robinson Patman Acts, Judge Bork believes to be beneficial to competition.[19] He states that the court is free to reject clear legislative conclusions and refuse to make rules to effectuate these "erroneous" legislative instructions.[20] In short, he would have judges substitute their judgment for that of the legislature.[21] This attitude

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[17] Id. at 412.

[18] Id. at 65-66.

[19] Id. at 406. Judge Bork is absolute in his declarations that the law should abandon "all concern" with such business practices. Similarly, in discussing vertical mergers in particular, he states that "in the absence of a most unlikely proved predatory power and purpose, antitrust should never object to the verticality of any merger." (Emphasis added.) Id. at 245. Judge Bork's statements regarding these issues indicate a predisposition of the outcome of any dispute regarding these questions without an examination of the facts of the case in which they arise. Such prejudgment is inappropriate for a Justice of the Supreme Court.

[20] Antitrust Paradox at 409-10.

[21] Judge Bork would apparently permit practices including ones which have long been considered illegal and which Congress has made no attempt to legalize. For example, Judge Bork would permit resale price maintenance despite

(Footnote continued on next page)

is not one of an individual practicing judicial restraint nor is it indicative of someone applying a neutral, judicial philosophy.

Judge Bork's suggestions for revamping the antitrust laws also indicate that he feels free to reject years of judicial precedent. It has been estimated that Judge Bork would overrule, if he could, about 90 percent of the Supreme Court's total antitrust decisions.[10/] Judge Bork has testified that the Court should not overrule precedent in areas of the law where the judicial interpretations are long standing and people have come to rely on them.[11/] At what point does such law become well enough established? Apparently decades

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(Footnote continued from previous page)

the fact that it has been illegal since Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). As Justice Brennan noted in concurring in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 769 (1984), the Court properly rejected the Solicitor General's urging that the Court overrule Dr. Miles in light of the fact that the decision had stood for 73 years without Congress enacting legislation to overrule it. Judge Bork, it seems, would not exercise similar judicial restraint and deference to Congress.

10/ Memorandum from Robert Pitofsky, Dean of Georgetown University Law Center to J. Blattner, at 2 (July 2, 1987), quoted in The Judicial Record of Judge Robert H. Bork (1987) at 72.

11/ In his testimony before this Committee, Judge Bork repeatedly gave as examples of such long-standing decisions commerce clause and legal tender cases. Such decisions have not been controversial for many years. We wonder whether Judge Bork would leave undisturbed precedents which are not similarly without current critics, even if they are long-standing.

are not enough. Given the chance, Judge Bork would reverse or radically change the thrust of nearly a century of antitrust case law.[11/]

11/ As a judge on the Court of Appeals, Judge Bork has shown impatience with the Supreme Court's adherence to its examination of non-economic consequences. In Rothery Storage & Van Co. v. Atlas Van Lines Inc. 792 F.2d 210 (D.C. Cir. 1986), Judge Bork advanced his ideas regarding the importance of efficiency considerations. He noted that the arrangement, which all the judges found reasonable, could not possibly eliminate competition given the relatively small market share of the company and that it should be automatically assumed to have been introduced in order to achieve efficiencies. Judge Wald concurred in the decision noting her concern with the panel's conclusion that no balancing of the anticompetitive and procompetitive consequences of the arrangement was required since a defendant lacking significant market power cannot act anticompetitively by reducing output and increasing prices: She wrote:

> If, as the panel assumes, the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices, reliance on market power alone might be appropriate. But, I do not believe that the debate over the purposes of antitrust laws has been settled yet. Until the Supreme Court provides more definitive instruction in this regard, I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising.
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> * * *
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> Until the Supreme Court indicates that the only goal of antitrust law is to promote efficiency, as the panel uses the term, I think it more prudent to proceed with a pragmatic, albeit nonarithmatic and even untidy rule of reason analysis, than to adopt a market power test as the exclusive filtering out device for all potential violaters who do not comand a significant market share. (Id. at 230-232.)

Judge Bork's view of the role of the courts in the antitrust area and the way in which he selectively reads legislative history raises significant concerns regarding the effect of his appointment to the Supreme Court on other areas of the law. Judge Bork has written that "because the antitrust laws are so open-textured and leave so much to be filled in by the judiciary, the Court plays in antitrust almost as unconstrained a role as it does in constitutional law."[11/] As he does in the antitrust field, will he again select from the history of the framing of the Constitution and its amendments those pieces that support his views and ignore or reject those that do not?

Judge Bork's writings and statements regarding discrimination and affirmative action, sexual harassment and the right to privacy, in which he has indicated that he interprets the statutory and constitutional bases for many court decisions to exclude women from their scope or limit the protection they afford for women, seem predicated on a similarly selective approach to basic constitutional and statutory protections. Judge Bork has stated in these hearings that he now believes that women are covered by the equal protection clause and that the Court has established such coverage in the case law. Given his predisposition to reverse a century of antitrust law, we must question whether Judge Bork

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11/ Antitrust Paradox at 409.

will find precedents protecting women's constitutional rights firmly enough entrenched to escape his revision. With this uncertainty, his elevation to the Court would put at risk the legal framework which has ensured women access to education and employment opportunities which are essential to their economic well being.

We fear that Judge Bork is a judicial activist masquerading as a believer in judicial restraint and the need of the Court to look at the "original intent" of the framers of the Constitution. We fear that Judge Bork will be "unconstrained" in restricting our most fundamental rights and liberties specified in an "open textured" manner in the Bill of Rights, the 14th Amendment and the language of the Constitution itself.

In conclusion, BPW urges this Committee and the Senate to withhold its consent to Judge Bork's appointment to the Supreme Court. We believe that his confirmation as an Associate Justice poses risks that are too great for the credibility of the Supreme Court with significant and diverse segments of the nation at this point in our history. His writings and statements regarding antitrust law and individual rights raise questions about the protections he would afford women and small businesses.

Despite Judge Bork's stated reliance on "original intent," "neutral principles" and judicial restraint, his judicial philosophy, as reflected in The Antitrust Paradox,

permits the imposition of his theories of what the law should be, despite congressional intent and significant judicial precedent to the contrary. Judge Bork's writings and statements prior to and in these hearings create great uncertainty as to how Judge Bork, if confirmed, would interpret the fundamental rights and liberties under the "open textured" provisions of the Constitution.

As business and professional women we look to the Supreme Court as the ultimate arbiter and protector of our fundamental rights and liberties as well as the guarantor that the laws passed by Congress will be enforced. Judge Bork's changing views on important issues undermines our confidence that the law will continue to afford basic protections to women and small business.

We do not believe that this Committee or the Senate should consent to placing on the Supreme Court an individual whose judicial philosophy and views pose so much risk. We urge that the Committee and the Senate withhold its consent.

Thank you.

JIMMY CARTER

September 29, 1987

To Senator Joseph Biden

During the hearings being conducted by the Senate Judiciary Committee on the nomination of Judge Robert Bork, some prominent lawyers who served in my administration have testified in favor of his confirmation. Just to avoid any misunderstanding, I would like for the members of your committee to know that I am strongly opposed to Judge Bork's confirmation as an Associate Justice of the Supreme Court of the United States.

Like many other interested Americans, I have reviewed some of the key judicial rulings and scholarly papers of Judge Bork on the most significant and often controversial issues of our time, and I find many of his forcefully expressed opinions in contradiction to my concept of what this nation is and ought to be. He has almost invariably sided with the most powerful and authoritarian litigant in the cases before him. This has been particularly troubling in his rulings that government forces have an extraordinary legal right to intrude on the privacy of individuals, a notion that has always been strongly opposed in our section of the country.

Furthermore, as a Southerner who has observed personally the long and difficult years of the struggle for civil rights for black and other minority peoples, I find Judge Bork's impressively consistent opinions to be particularly obnoxious. I remember vividly the judicial debates concerning public accommodations, the poll tax, and affirmative action. Along with most other people of the South, I have appreciated the wisdom and courage of lawyers and judges who finally prevailed on these issues in order to eliminate legally condoned racism in our country. It is of deep concern to me that Judge Bork took public positions in opposition to these advances in freedom for our minority citizens.

Only recently, with the vision of a seat on the Supreme Court providing some new enlightenment, has Judge Bork attempted to renounce some of his more radical writings and rulings. It seems obvious that, once confirmed, those lifelong attitudes that he has so frequently expressed would once again assert themselves on the Court and have a deleterious effect on future decisions involving personal freedom, justice for the deprived, and basic human rights.

I urge you and other Senators to reject this nomination.

Sincerely,

Jimmy Carter

The Honorable Joseph Biden
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

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Executive Director

September 11, 1987

BY FEDERAL EXPRESS

Senator Paul M. Simon
462 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Simon:

As you requested, the Chicago Council of Lawyers has analyzed the judicial philosophy and record of Judge Robert H. Bork. The Council's analysis has been conducted jointly by its Board of Governors and its Federal Judicial Evaluations Committee and is based upon a thorough review of all of Judge Bork's judicial opinions, articles, and speeches as well as the extensive literature concerning Judge Bork. The enclosed report is the product of that analysis.

The Council has concluded that Judge Bork's nomination to the United States Supreme Court should not be confirmed. Judge Bork's view of the limits imposed by the Constitution on government action is so narrow as to threaten the most fundamental of our individual liberties. This is particularly worrisome because, contrary to the claims of some of Judge Bork's supporters, he is neither an advocate nor a practitioner of judicial restraint as were Justices Frankfurter and Harlan, both of whom showed great respect for precedent. Indeed, if Judge Bork is to be taken at his word, criminals could be sterilized, married couples forbidden to use contraceptives, and racially restrictive covenants enforced. This is not judicial restraint; it is abdication of the duty to enforce the rights guaranteed by the Constitution.

We urge you not to allow Judge Bork to become a justice on the United States Supreme Court. If you would like any additional information, please do not hesitate to contact me.

Sincerely,

Frederick J. Sperling
President

FJS/kmm

Enclosure

cc: Ms. Deborah Leavy (by Federal Express w/enc.)

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REPORT OF THE CHICAGO COUNCIL OF LAWYERS
ON THE NOMINATION OF ROBERT H. BORK
TO THE UNITED STATES SUPREME COURT

September 11, 1987

INTRODUCTION

Founded in 1969, the Chicago Council of Lawyers is a bar association committed to the fair administration of justice, to the preservation of civil liberties, and to the improvement of the federal and state judiciary. The key to the realization of these goals is an able judiciary devoted to maintaining a proper balance between the power of citizens and the power of government. During the Council's early years, Illinois Senator Charles Percy asked the Council to evaluate nominees to the federal appellate and trial courts in Chicago. Since his election, Senator Paul Simon has continued that tradition.

When Judge Robert Bork was nominated to the United States Supreme Court, Senator Simon asked the Council to analyze Judge Bork's judicial philosophy and record as a judge on the United States Court of Appeals for the District of Columbia. The Council's analysis has been conducted jointly by its Board of Governors and its Federal Judicial Evaluations Committee. It is based upon a thorough review of Judge Bork's judicial opinions, articles, and speeches as well as the extensive literature concerning his judicial philosophy. This report is the product of that analysis.

Justices of the United States Supreme Court have a special responsibility under our system of separation of powers. They are the final guardians of the rights of individuals against intrusion by the federal and state governments. While all other judges are bound by the precedential rulings of higher courts, Supreme Court Justices, though constrained by the principle of *stare decisis*, have the awesome power to overrule previous case law and constitutional doctrine. It is with these considerations in mind that the Council conducted its analysis and reached the following conclusions:

1. The Senate should fully perform its constitutional "advice and consent" responsibility to consider the philosophy of Supreme Court nominees as it has done in the past.

2. Judge Bork's constitutional philosophy is extremist and threatens fundamental individual rights.

3. Judge Bork has an extremely narrow view of the proper role of the judiciary as a check on the other branches of government.

4. Judge Bork's record does not show a pattern of traditional judicial restraint, but rather a tendency to manipulate doctrine in order to achieve substantive outcomes dictated by his ideological views.

I. THE SENATE SHOULD FULLY PERFORM ITS CONSTITUTIONAL "ADVICE AND CONSENT" RESPONSIBILITY TO CONSIDER THE PHILOSOPHY OF SUPREME COURT NOMINEES AS IT HAS DONE IN THE PAST.

During the public debate on Judge Bork's nomination, some of his supporters have questioned whether it is appropriate for the Senate to consider the nominee's judicial philosophy and widely expressed views on constitutional jurisprudence. These supporters believe that only Judge Bork's intellectual abilities, personal integrity, and legal experience should be considered. Such a limited examination would not comport with the Senate's constitutional mandate or with past practice.

The Senate's first rejection of a nominee to the Supreme Court is instructive. In 1795, President George Washington nominated John Rutledge as Chief Justice. Rutledge's nomination was defeated in the Senate by a vote of 14-10 principally because of his vigorous opposition to the Jay Treaty of 1794. No significant questions were apparently raised regarding his integrity. Rutledge previously had been confirmed as an Associate Justice of the Supreme Court.1/ Four senators who participated in the debate on Rutledge's nomination as Chief Justice had been members of the Constitutional Convention in Philadelphia eight years earlier. Surely, they were familiar with the Framers' intentions regarding the Senate's duty to inquire into a nominee's philosophy.

The Senate continued to explore the philosophies and records of Supreme Court nominees throughout the 19th century. During that period, the Senate rejected almost one-third of the nominees it considered; several such rejections reflected philosophical objections. For example, in 1845 the Senate rejected the nomination of George W. Woodward in large part because of his "gross nativest American sentiments," which were particularly abhorrent to Irish-Americans.2/

One of the best known examples of such Senate scrutiny was in response to President Hoover's 1930 nomination to the Supreme Court of Judge John J. Parker of the Court of Appeals for the Fourth Circuit. Although Judge Parker had a distinguished judicial record, the Senate rejected his nomination in large part because he was considered to be "unfriendly" to labor as a result of his decision upholding so-called "yellow dog contracts." Civil rights groups also opposed the nomination because, in 1920,

when campaigning to become Governor of North Carolina, Parker declared:

> The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.3/

Most recently, in 1968, the opposition to President Johnson's nomination of Associate Justice Abe Fortas as Chief Justice was led by Senator Strom Thurmond of South Carolina. In characterizing the Senate's role in the nomination and confirmation process, Senator Thurmond said:

> To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed. . . . [I]f the Senate will turn down this nomination, we will thus indicate to the President and future Presidents that we recognize our responsibility as Senators. After all, this is a dual responsibility. The President merely picks or selects or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into and determining whether or not he is a properly qualified person. . . .4/

From the time of the Federalist Papers and the Rutledge confirmation battle, the Senate has properly examined the philosophy and record of Supreme Court nominees. Accordingly, Judge Bork's philosophy and record as an appellate court judge are appropriate subjects of inquiry in the confirmation process.

II. JUDGE BORK'S CONSTITUTIONAL PHILOSOPHY IS EXTREMIST AND THREATENS FUNDAMENTAL INDIVIDUAL RIGHTS.

Judge Bork's view of the limits imposed by the Constitution on government action is so narrow as to threaten our most fundamental liberties. He contends that legislative majorities have almost unbridled discretion to define and to constrain individual freedoms, and that their actions, in effect, stand beyond the reach of the Supreme Court. To that end, Judge Bork denigrates the Bill of Rights as "a hastily drafted document on which little thought was expended."5/

In attempting to justify his extremely narrow view of constitutionally protected rights, Judge Bork repeatedly invokes a simplistic and historically discredited version of the concept of "original intent," a doctrine that limits the scope of individual rights to only those envisoned by our Eighteenth Century forebearers. Few dispute the idea that the Framers' intent, to the extent it can be discerned, is one factor to be considered in

constitutional adjudication. But reliance on a wooden doctrine of "original intent" as the only basis for proper constitutional decision-making has been criticized by many scholars.6/ Below its surface appeal, the doctrine is intellectually unsatisfactory and does not provide a truly value-neutral method of adjudication.

First, even in those cases where there is some evidence of intent, it is not at all clear whose intent should govern. Is it the intent of the Framers or of the members of the various state ratifying conventions or of both? And how are we to resolve the often conflicting views among and between members of these groups?

Second, there is persuasive historical evidence that the Framers themselves did not intend the Constitution to be interpreted based on the Framers' "original intent."7/ Indeed, even James Madison stated that "(a)s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character."8/

Most importantly, however, some degree of abstraction of "intent" is essential to accomodate modern constitutional adjudication. For example, although the Framers wrote that no "person" may be deprived of "property" without "due process," they could not have had specific intentions as to the application of the Due Process Clause to claims for modern social welfare benefits. See, e.g., Goldberg v. Kelly, (public assistance payments cannot be terminated without a prior evidentiary hearing).9/ Because the Framers did not foresee the events which led to New Deal legislation cannot mean that constitutional protections should not be applied to the rights that evolved and developed during that period. Otherwise the Constitution ossifies and becomes a largely irrelevant historical artifact.

As Chief Justice John Marshall recognized in 1819 in McCulloch v. Maryland: "It is a Constitution we are expounding . . . intended to endure for ages to come and consequently to be adapted to the various crises of human affairs."10/ Thus, even the intentionalists, proponents of constitutional adjudication by "original intent" including Judge Bork, are compelled to concede that modern jurists must apply constitutional principles to controversies beyond the foresight of those living when the Constitution was drafted and ratified.11/

The intentionalists' process of adressing controversies not foreseen by the Framers, contrary to the claims of the proponents of "original intent," is not objective. Indeed, the proponents of "original intent" are guided by an agenda that implicitly and dangerously limits individual rights.

The implications of Judge Bork's pronounced adherence to the doctrine of "original intent" are startling. He profoundly disagrees with much of the constitutional law that has developed following the Second World War, including:

* The right of married couples to use contraception. (He has stated that the right to privacy propounded in Griswold v. Connecticut has no support in the Constitution and that the case was "wrongly decided."12/)

* The principle of "one person, one vote." (He has denounced the formula, set out in Reynolds v. Sims, as lacking a "theoretical basis."13/)

* The right of a woman to choose to have an abortion. (He has stated that "nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade."14/)

* The state-mandated restraints on sterilization of habitual criminals. (He has criticized the result in Skinner v. Oklahoma.15/)

* The principle that restrictions in deeds forbidding the sale of homes to Blacks cannot be enforced by courts. (He has criticized Shelley v. Kraemer which denied the enforceability of racial covenants.16/)

* The right to free speech on a broad range of social subjects. (He stated that the First Amendment protects only "explicitly political" speech, although he now concedes that other forms of discourse may be protected. He still would allow much less constitutional protection for controversial political speech than the Supreme Court has protected for nearly 40 years.17/)

* The right to freedom from state-sanctioned prayers in public schools. (He has criticized Engel v. Vitale.18/)

The extreme views which he expressed in his 1971 Indiana Law Journal "Neutral Principles" article attacking the constitutional underpinnings of fundamental individual liberties appear to be his views today.19/ Therein, Judge Bork characterized individual liberties not as rights, but as mere "gratifications": "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between . . . gratifications. . . . There is no principled way to decide that one man's gratifications are more deserving of respect than another's."20/ As the eminent - and conservative - constitutional scholar Professor Philip B. Kurland recently wrote, "Bork's entire current constitutional jurisprudential theory is essentially directed to the diminution of minority and individual rights."21/

Most certainly Judge Bork's views, if not constrained by precedent, would have a profound effect on constitutional decision-making. The consequences of confirming a nominee whose adherence to a theory that renders him inflexible in responding to the emerging needs of a changing society should be rigorously examined. As Professor Kurland stated in response to Judge Bork's criticisms of numerous key Supreme Court rulings:

> [G]enerations later the issue is no longer whether these opinions were ill-founded. The question now is whether long-existing constitutional doctrines should be destroyed or can be uprooted without dire consequences to the social system. I submit that you cannot pull large numbers of threads from the constitutional cloth at one time without destroying the integrity of the fabric. To do so is to engage in revolution, however pious its proponents may sound. Abolition of minority rights is no less tyrannical because it is advocated by "brilliant" minds.22/

Finally, Judge Bork's intolerance of criticism is disturbing. He has characterized the many lawyers, judges, and scholars who have substantial and well-founded disagreements with his formulation of constitutional theory as dishonest "philosophers" who would re-write the Constitution and as "the lowing herd of independent thinkers, the legal academics."23/ Such unfair and narrow-minded characterizations suggest peril for principled constitutional adjudication by Judge Bork.

III. JUDGE BORK HAS AN EXTREMELY NARROW VIEW OF THE PROPER ROLE OF THE JUDICIARY AS A CHECK ON THE OTHER BRANCHES OF GOVERNMENT.

Judge Bork is portrayed by his supporters as an advocate and practitioner of "judicial restraint" whose philosophy is in the "mainstream tradition" exemplified by such jurists as Felix Frankfurter and John Marshall Harlan.24/ However, the Council's review of Judge Bork's judicial opinions, writings, and speeches reveals a different and disturbing image: a judge whose view of the role of the judiciary is less grounded on a philosophy of restraint than it is directed to realization of his vision of society.

Judge Bork wrote recently that "we appear to be at a tipping point in the relationship of judicial power to democracy. . . . The future role of the American judiciary will be decided by the victory of one set of ideas over the other."25/ His "set of ideas" begins with the belief that the judiciary should almost invariably defer to the will of the political majority as reflected by the enactments of the Executive branch, Congress and

state legislatures. Although this view, standing alone, is consistent with traditional "judicial restraint," Judge Bork's record discloses a different kind of judicial activism aimed at dramatically reducing the core institutional role of the federal courts in protecting individual rights. Should Judge Bork's views prevail on the Supreme Court, the critical role historically performed by the federal judiciary in acting as a check on the Executive and Legislative branches would be significantly altered.

While a traditional view of "judicial restraint" respects both the doctrine of separation of powers and Supreme Court precedents, Judge Bork's statements indicate that he frequently would relinquish the duty of the courts "to say what the law is" (a duty dating back to 1803 and Marbury v. Madison) in order to advance his own views. This practice turns "judicial restraint" on its head and poses the danger that Judge Bork would use his power as a Justice on the Supreme Court not to conserve judicial authority, but to abandon it.

For example, in the recent case of Bartlett v. Bowen the Court of Appeals' majority harshly criticized Judge Bork's dissenting position that judicial review of the constitutionality of certain provisions of the federal Medicare statute was barred by the doctrine of sovereign immunity.26/ The majority strongly rejected Judge Bork's "extraordinary and wholly unprecedented application of the notion of sovereign immunity" which would have the effect of precluding all judicial review of legislative action. "Judicial review has been with us since Marbury v. Madison, and no one has ever before suggested that it is discretionary on Congress' part."27/ Judge Bork's colleagues then observed that:

> [T]he dissent's immunity theory in effect concludes that the doctrine of sovereign immunity trumps every other aspect of the Constitution. . . . [S]uch an extreme position simply cannot be maintained. . . . To preclude judicial review in such a situation would be just as unconstitutional as the underlying governmental action. . . . [It] flagrantly ignores the concept of separation of powers and the guarantee of due process. We see no evidence that any court, including the Supreme Court, would subscribe to the dissent's theory in such a case.28/

In performing its constitutional "advice and consent" function, the Senate should focus its inquiry on Judge Bork's record and not allow the nominee and his advocates to frame the debate in terms that distort it. The record reveals a judge who

is neither "conservative" nor "restrained" in the traditional sense when individual liberties are at stake. Moreover, Judge Bork's version of judicial review, if it becomes the prevailing view, would undermine the courts' constitutional role in protecting individual rights.

IV. JUDGE BORK'S RECORD DOES NOT SHOW A PATTERN OF TRADITIONAL JUDICIAL RESTRAINT, BUT RATHER A TENDENCY TO MANIPULATE DOCTRINE IN ORDER TO ACHIEVE SUBSTANTIVE OUTCOMES DICTATED BY HIS IDEOLOGICAL VIEWS.

The record does not show Judge Bork to be a consistent practitioner of principles of judicial restraint. Rather, the principal unifying theme in his opinions is their outcome. In reviewing Judge Bork's record of written opinions, especially in "split decisions," it is a distressing truism that one can accurately predict Judge Bork's vote in almost any key case simply by identifying the parties involved. In cases where the government and businesses were parties, Judge Bork persistently ruled for business and, in so doing, often refused to adhere to principles of judicial restraint. Conversely, in cases where the government and consumer or environmental organizations were parties, Judge Bork often invoked severe judicial restraint in ruling in favor of government and against public interest parties.

The pattern of decisions favoring government and business over those of individuals is striking. Judge Bork's votes appear to reflect no consistent application of judicial principles or philosophy, but rather an activist manipulation of doctrine to achieve desired outcomes. The thorough analysis of Judge Bork's voting record published by the Public Citizen Litigation Group provides a comprehensive description of his adjudicatory practices in many substantive areas. Four recent opinions written by Judge Bork involving review of electricity ratemaking decisions by the Federal Energy Regulatory Commission ("FERC") are illustrative. Jersey Central Power & Light v. FERC,29/ Mid-Tex Electric Co-Op v. FERC,30/ Delmarva Power & Light v. FERC,31/ and Middle South Energy v. FERC.32/ The contrasts in Judge Bork's analysis and votes are instructive because in each case:

(1) The central conflict was between an electric utility and the same administrative agency which was obligated to balance businesses' and consumers' financial interests;

(2) The key ratemaking issues involved technical economic, accounting, and policy determinations;

(3) The financial stakes were huge - many millions of

dollars in the case;

(4) The decisions by the FERC and the Court would have widespread applicability to many other electric utilities and consumers; and

(5) The jurisprudential task was essentially the same - the Court of Appeals was required to interpret the Federal Power Act and/or to ascertain the appropriate degree of deference to the FERC's determination.

Notwithstanding this parallelism, Judge Bork proceeded in plainly dissimilar ways. His outcome, though, was always the same: each decision was to the electric utility's benefit and the consumers' detriment. To accomplish these results, Judge Bork manipulated the well-established doctrine of judicial deference to the decisions of administrative agencies in their areas of special expertise.

In Jersey Central, Middle South and Delmarva, the FERC's rulemaking or adjudicatory decision would have benefitted consumers' interests. On judicial review, Judge Bork paid little heed to principles of deference to the agency's determination. Insteac, he adopted very literal statutory constructions and/or insisted on the FERC's strict compliance with its procedural rules in vacating the agency's decisions. In Mid-Tex, however, when reviewing a FERC rule which favored the utility's interests, Judge Bork countenanced a "flexible" statutory interpretation and generally deferred to the FERC.

The Council's analysis indicates that if one knows the identities of the parties in closely-contested cases decided by Judge Bork, then the outcome can be predicted accurately with worrisome frequency. Rather than revealing a consistent judicial philosophy or doctrine of restraint, Judge Bork's record demonstrates a distressing tendency to manipulate doctrines in order to achieve the outcome that he desires.

CONCLUSION

The Council believes that the Senate should exercise its constitutional "advice and consent" responsibilities to reject the nomination of Judge Bork.

FOOTNOTES

1/ Rutledge did not serve as an Associate Justice because, before his first term on the Supreme Court would have commenced, he resigned to become the Chief Justice of the South Carolina Supreme Court.

2/ Abraham, Justices & Presidents: A Political History of Appointments to the Supreme Court, 2nd Ed., 1985, Oxford University Press, at 41. An excellent discussion appears at pages 41-45 respecting the Supreme Court nominees who were defeated because the Senate disapproved of their philosophies or "their [past] involvement with public issues."

3/ Id. at 43.

4/ Senator Strom Thurmond, quoted in statement of John E. Clay, President, Lawyers for the Judiciary, September 8, 1987.

5/ Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1 (1971). Judge Bork has reaffirmed views he expressed in this article during subsequent interviews. "Judge Bork is a Friend of the Constitution," Conservative Digest (Oct. 1985); "A Talk with Robert H. Bork," District Lawyer (No. 5, May/June 1985).

6/ See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) at 1-43.

7/ H. Jefferson Powell, "The Original Understanding of Original Intent," 98 Harvard Law Review 885 (1985).

8/ Letter from James Madison to Thomas Ritchie (September 15, 1821), reprinted in 3 Letters and Other Writings of James Madison at 228 (1865), Philadelphia: J.B. Lippincott & Co.

9/ Goldberg v. Kelly, 397 U.S. 254 (1970).

10/ McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

11/ Bork, "Neutral Principles," at 13-15.

12/ Bork, "Neutral Principles," criticizing Griswold v. Connecticut, 381 U.S. 479 (1965).

13/ "Neutral Principles," criticizing Reynolds v. Sims, 377 U.S. 533 (1964).

14/ Statement of Professor Robert Bork, Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm. on S. 158: A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, 97th Cong., 1st Sess. 310, 315 (April - June 1981), criticizing Roe v. Wade, 410 U.S. 113 (1973).

15/ "Neutral Principles," criticizing Skinner v. Oklahoma, 316 U.S. 535 (1942).

16/ "Neutral Principles," criticizing Shelley v. Kraemer, 334 U.S. 1 (1948).

17/ See note 5.

18/ Speeches at NYU Law School, 1982, and The Brookings Institution, 1985, reported in the Washington Post, July 28, 1987, at A8, criticizing Engel v. Vitale, 370 U.S. 421 (1962). The newspaper article states that Judge Bork denied having referred to "specfific cases" in his speech.

19/ See note 5.

20/ See note 5.

21/ Philip B. Kurland, Letter Appearing in "Voice of the People," Chicago Tribune, Sec. 4, p. 2 (September 6, 1987).

22/ Id.

23/ Robert H. Bork, "The Crisis in Constitutional Theory: Back to the Future." Speech before The Philadelphia Society, April 3, 1987.

24/ White House Paper on the Nomination of Judge Robert Bork for the Supreme Court of the United States, July 27, 1987.

25/ Robert H. Bork, "The Constitution, Original Intent, and Economic Rights," 23 San Diego L. Rev. 823, 824 (1986).

26/ Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987).

27/ Id. at 710.

28/ Id. at 711.

29/ Jersey Central Power & Light v. FERC, 730 F.2d 816 (1984) on rehearing 768 F.2d 1500 (1985), rehearing en banc 810 F.2d 1168 (1987).

30/ Mid-Tex Electric Co-op v. FERC, 773 F.2d 327 (1985).

31/ Delmarva Power & Light v. FERC, 770 F.2d 1131 (1985).

32/ Middle South Energy v. FERC, 747 F.2d 763 (1984).

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TESTIMONY TO

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

THE NOMINATION OF ROBERT H. BORK TO
THE UNITED STATES SUPREME COURT

by

Marian Wright Edelman
President, Children's Defense Fund

September 28, 1987

The Children's Defense Fund appreciates the opportunity to provide testimony to the Committee on the Judiciary concerning the nomination of Judge Robert H. Bork to the United States Supreme Court. After thorough review of Judge Bork's voluminous record, we believe his confirmation is contrary to the best interests of America's children and strongly urge your rejection of his nomination to the highest Court in our land.

The Children's Defense Fund (CDF) is a privately funded public charity dedicated to providing a strong and effective voice for children, especially poor and minority children and their families. We believe that parents, churches, business, non-profit groups, and every level of government must work together to prepare America's children for the challenges and opportunities facing our nation now and in the future.

CDF feels compelled to speak out against the nomination of Judge Bork because he has long and stridently advocated both a constitutional philosophy and a philosophy of judging that jeopardize the well-settled legal doctrines that protect families and that help children develop their potential to be productive members of our society. Our conclusion that Judge Bork's nomination should be rejected has been affirmed by his testimony before this Committee.

In our scheme of government, courts play a critical role safeguarding children and mediating the delicate relations between families and the state. We rely on families, in the first instance, to support, nurture, and protect children. But our society also relies on courts to protect children when families or others fail them, and to prevent against unwarranted

governmental regulation of families and the way they choose to raise and educate their children. This is true no less of the United States Supreme Court than of the county juvenile court.

The constitutional doctrines that have allowed the United States Supreme Court to protect children and the integrity of families are among the doctrines that Judge Bork has labelled "lawless," "unwarranted," and "without principle." By threatening the continued vitality of these doctrines, Judge Bork's confirmation would jeopardize the best interests of America's children and families.

Freedom from Unjustified Government Interference in Family Life. Families are the bedrock of our society. Because of their fundamental importance, the Supreme Court has recognized a constitutional right to privacy that shields families against unjustified governmental interference in their affairs. Developed in a series of cases dating back to the early part of this century, this right protects the very fabric of the family, giving special legal recognition to parents' responsibility for the care of their children and to parental decisions about how to raise and educate children. Doctrinally, it rests on the idea that the "liberty" protected by the Constitution includes more than mere freedom from bodily restraint. It includes also "the right ... to marry, establish a home, and bring up children."[1] It expresses the framers' conviction that there are areas of human endeavor in which public officials should rarely if ever intercede.

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1. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Judge Bork has left no doubt that he rejects the idea that there is a constitutional right to privacy,[2] and he has singled out for criticism the seminal cases, more than a half century old, recognizing a right of family integrity, Meyer v. Nebraska[3] and Pierce v. Society of Sisters.[4] The Supreme Court in these cases held unconstitutional state attempts to usurp parental authority over decisions regarding their children's education. In Meyer, it invalidated a Nebraska statute, passed in the anti-immigrant fervor after World War I, making it a crime to teach foreign languages in school. In Pierce, the Court struck down a law prohibiting parents from sending their children to private schools. The law, the Court said,

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control... The fundamental theory of liberty upon which all governments in this Union repose excludes any general power to standardize ... children... The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for ... [life's] obligations.[5]

The continued importance of constitutional recognition of family privacy interests is evident in recent cases limiting the power of the state to terminate parental rights, to restrict the

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2. E.g., McGuigan, "Judge Bork is a Friend of the Constitution," 11 Conservative Digest 91, 97 (Oct. 1985).

3. 262 U.S. 390 (1923).

4. 268 U.S. 510 (1925). See R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 11 (1971).

5. Id. at 534-535.

rights of extended families to live together, and to prevent certain citizens from marrying. In 1982 the Supreme Court ruled that a state cannot remove a child from his parents without substantial justification; it held that a state seeking to take a child away from its parents on the grounds the child has been abused or neglected must prove its case to a degree greater than the level of proof required in routine civil litigation. It based this decision in part on the importance of the family: the parents' interests in the care and custody of their children, the Court affirmed, are "more precious than any property right." Santosky v. Kramer.[6] In 1972 the Court ruled that family privacy rights prohibited a state from taking children from their father, upon their mother's death, solely because their mother and father were not married. The father in question, Peter Stanley, had lived with the mother for 18 years and raised three children with her. Stanley v. Illinois.[7]

In 1977 the Court relied on the right of privacy in ruling that cities cannot use zoning or other laws to exclude family groups other than nuclear families from residential neighborhoods. The case was brought by a grandmother who lived with her adult child, that child's son, and another grandchild. Local zoning laws made it a crime for this traditional three-generation household to live together in one home. Moore v. City of East Cleveland, Ohio.[8] And in 1978 the Court held that it

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6. 455 U.S. 745, 759 (1982).

7. 405 U.S. 645 (1972).

8. 431 U.S. 494 (1977).

violated the right to privacy for a state to deny a man the right to marry because during a period of indigency he had been unable to pay support to children of a previous union. The plaintiff in the case, Mr. Redhail, had been denied a license to marry a woman pregnant with his child because, while unemployed, he had failed to make child support payments. Zablocki v. Redhail.[9]

Judge Bork has denounced the important and well-established right of privacy as "utterly specious" and has labelled the Court's privacy decisions as "unconstitutional." He has claimed that the liberty "to marry, establish a home, and bring up children" is not among the liberties that the founding fathers sought to secure in the Constitution.[10] He has embraced this view not only in his speeches and writings but also in his work on the bench. For example, in a recent appellate court decision concerning visitation rights by a non-custodial parent, Judge Bork questioned the family protection doctrine and expressed the view that familial bonds between children and their divorced or

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9. 434 U.S. 374 (1978). Lower courts, applying these decisions, have enunciated other important legal protections for families and children. In Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976), for example, a federal district court struck down a law providing for termination of the parent-child relationship whenever the state found termination to be "in the best interests" of the child. The court held that a state may sever the parent-child relationship "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing." Id. at 779.

10. R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 9 (1971). Statement of Robert Bork, Hearings on S. 158 Before the Subcom. on the Separation of Powers of the Senate Com. on the Judiciary, 97th Cong., 1st Sess. (April-June 1981); McGuigan, "Judge Bork is a Friend of the Constitution," 11 Conservative Digest 91, 97 (Oct. 1985).

separated parents are undeserving of constitutional protection. Franz v. United States.[11]

Judge Bork's unyielding conviction that the Constitution provides no special protection to family ties places him well outside the mainstream of twentieth century constitutional tradition. The Due Process Clauses of the Fifth and Fourteenth Amendments protect liberty. Through the years, Justices and judges of widely varied backgrounds and philosophies have concluded that this liberty includes protection of the family, recognizing, as Justice Goldberg once wrote,

> [t]he fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so.[12]

Conservative jurists from Justice John Marshall Harlan to Justice Lewis Powell have embraced this view. Justice Harlan, the archetypical practitioner of judicial restraint, acknowledged that

> the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.
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> ....
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> ... [It includes] what, by common understanding throughout the English-speaking world, must be granted to be a

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11. 712 F.2d 1428 (D.C. Cir. 1983).

12. Griswold v. Connecticut, 381 U.S. 479, 495-496 (1965)(Goldberg, J., concurring).

> most fundamental aspect of "liberty," the privacy of the home in its most basic sense.[13]

Judge Bork not only rejects the constitutional understanding that a family's home is its castle but in his writings has displayed extraordinary insensitivity to families' interests in privacy and autonomy. He has compared a married couple's interest in freedom from government intrusion in their affairs to the financial interest of an electric utility company in avoiding governmental pollution controls and concluded that he could see no reason for affording the married couple's privacy interest greater constitutional protection than the economic interest of the utility.[14] Presumably, in Judge Bork's view, a government decree limiting couples to two children would be constitutionally indistinguishable from a decree limiting factories to two smokestacks.

During his tenure as an appellate judge, Judge Bork decided two cases involving claims based on the right to privacy. He rejected the claims in both cases. In one, Dronenburg v. Zech,[15] he cast judicial restraint to the winds and wrote a lengthy and gratuitous critique of the Supreme Court's privacy decisions. Four of his fellow judges were moved to write that his

> extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court...

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13. Poe v. Ullman, 367 U.S. 497, 543-548 (1961).

14. See R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 9-10 (1971).

15. 741 F.2d 1388 (D.C. Cir. 1984).

> Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court.
>
> We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint... [S]urely it is not ... [a lower court's] function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.[16]

In the second case, Franz v. United States,[17] he rejected the claim of a divorced father who sued the government for totally severing his ongoing relationship with his children. In a concurring opinion, he expressed the view that the Constitution does not protect the familial bonds between children and their divorced or separated parents. No other jurist to our knowledge has ever embraced this extreme view. Justice Powell, for one, understood that

> [o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family... [C]onditions of modern society have ... not erased the accumulated wisdom of civilization ... that supports a larger conception of the family.[18]

The elimination of the right to privacy would remove the leading legal bulwark against government tyranny over families. The nomination of Judge Bork threatens such a result. Justice Powell, whom Judge Bork would replace, deeply appreciated the

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16. 748 F.2d 1579, 1580 (D.C. Cir. 1984) (dissenting from denial of petition for rehearing en banc) (Robinson, J.).

17. 712 F.2d 1428 (D.C. Cir. 1983).

18. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 505 (1977).

privacy rights of families, and he often provided the deciding vote in cases enlarging the constitutional protection of family privacy interests.[19] Judge Bork's contrary views pose a serious threat to the freedom and integrity of the American family.

Protection of Children From Discrimination. Discrimination on the basis of race, gender, handicap, or out-of-wedlock birth prevents many children and families from participating fully in our society, robbing them of economic security and hope. For decades the United States Supreme Court has applied the Equal Protection Clause to strike down these and other forms of invidious discrimination. Judge Bork's record makes clear that he would not combat discrimination with the same vigilance. Indeed, he has characterized most of the substantive doctrines developed by the Supreme Court in the area of equal protection as "improper."[20]

While most government actions are based on distinctions that the courts properly presume to be valid, certain types of executive or legislative actions must be reviewed by the courts with special care because their underlying motives are likely to be flawed or because they unthinkingly continue unequal treatment of historically victimized groups. The Supreme Court applies such special care in reviewing government conduct that discriminates on the basis of characteristics normally irrelevant to law-making such as race, gender, length of residence, and out-

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19. E.g., Santosky v. Kramer, 455 U.S. 745 (1982); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 505 (1977).

20. R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 11 (1971).

of-wedlock birth, and this degree of judicial scrutiny provides important protections for children, assuring that groups of them are not unreasonably denied education, medical services, child support, social security, and other government benefits.

For example, the Court in 1969 forbade states from denying public assistance to indigent children resident in the state less than one year. Shapiro v. Thompson.[21] The children of one plaintiff family in the case had been denied assistance when their mother, after learning she had cancer, moved to the state of Washington to be closer to her family. In a similar case in 1974, the Court barred states from discriminating against new residents in the provision of free non-emergency medical care. Memorial Hospital v. Maricopa County.[22]

In 1968 the Supreme Court refused to allow a state to permit legitimate but not illegitimate children to bring wrongful death claims for compensation for the death of their mother, writing:

> [t]he children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

Levy v. Louisiana.[23] The Court has since outlawed a variety of other disabilities imposed on children born out-of-wedlock, including legislative prohibitions against receiving certain

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21. 394 U.S. 618 (1969).

22. 415 U.S. 250 (1974).

23. 391 U.S. 68, 72 (1968).

social security benefits, Jimenez v. Weinberger.[24] In addition, it has provided children born out-of-wedlock critical assistance in establishing their paternity, Mills v. Habluetzel,[25] and securing financial support from their fathers, Gomez v. Perez.[26]

Judge Bork has tried to trivialize in his testimony the Supreme Court's rigorous review of classifications based on gender, by citing a drinking age case, but this review has provided important protections for children. For example, in 1975 the Court struck down a Utah statute that required fathers to support their sons until age 21 but their daughters only until age 18. Stanton v. Stanton.[27] In 1979 the Court invalidated a law authorizing the payment of welfare benefits to indigent children in two-parent families when their poverty was caused by the unemployment of their father but not when caused by the unemployment of their mother. Califano v. Westcott.[28]

Decisions such as these, protecting children against an array of arbitrary government actions, are unlikely to come from the pen of Judge Bork, who as an academic and a judge has traversed this nation urging a radical narrowing of constitutional protections against discrimination. He has questioned the use of any special care in reviewing distinctions based on characteristics other than race under the Equal

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24. 417 U.S. 628 (1974).
25. 456 U.S. 91 (1982).
26. 409 U. S. 535 (1973).
27. 421 U.S. 7 (1975).
28. 443 U.S. 76 (1979).

Protection Clause. Dismissing myriad equal protection rulings in cases involving non-racial discrimination, Judge Bork has claimed there is "no principled way of saying which non-racial inequalities are impermissible."[29] Thus, in his view:

> The equal protection clause ... does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause.[30]

Judge Bork's extreme approach would overturn decades of important precedent and leave millions of vulnerable children and others without constitutional protection against a variety of forms of unprincipled harmful treatment.

The present-day interpretation of the Equal Protection Clause, against which Judge Bork has inveighed, is hardly a radical one. Its doctrinal foundations are as much the creation of the Burger Court as the Warren Court. It was during the 1970's that the Court came to review with exacting scrutiny government conduct that invidiously discriminates on certain non-racial grounds such as gender, out-of-wedlock-birth, and handicap. Justice Powell himself was a forceful and articulate spokesman for this view.[31]

Judge Bork has tried to assure this Committee that, if confirmed, he would interpret the Equal Protection Clause in a

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29. R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 11 (1971) (emphasis added). See also Federalism and Gentrification, Address by Judge Bork to the Federalist Society, Yale Univ. (April 24, 1982), p. 2.

30. R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 11 (1971).

31. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (Powell, J., concurring).

way that adequately protects all citizens against unfair treatment. But his testimony makes clear that he would reject the exacting scrutiny the Court applies today and instead would evaluate all claims of discrimination on grounds other than race under the rational basis test. That test is so minimal -- generally accepting any justification proferred for a law, however tenuous its connection to the law or unrelated to the legislature's reasons for enacting the law -- that it is often no review at all. Judge Bork's record on the bench shows that, as applied by him, the rational basis test would provide little or no protection against official discrimination. In one of the two opinions he has written in cases raising equal protection claims, his application of the rational basis test was so cavalier that it drew stinging criticism from four other circuit court judges, including the chief judge. Judge Bork's opinion, they wrote:

> fails even to apply seriously the basic requirement that the challenged regulation be 'rationally related to a permissible end.' There may be a rational basis for the [challenged policy], but the panel opinion plainly does not describe it.

ronenburg v. Zech.[32] In the second opinion, he suggested that e fact that a legislative distinction had been used for most of r history might provide a rational basis for upholding it. sgrove v. Smith.[33] Under this circular reasoning, the fact at certain groups of children had long been victims of

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32. 746 F.2d 1579, 1581 (D.C. Cir. 1984) (dissenting from ial of petition for rehearing en banc) (Robinson, J.).

33. 697 F.2d 1125, 1145 (D.C. Cir. 1983) (Bork, J., curring)

discrimination would itself provide an argument for sustaining and prolonging their mistreatment.

A jurist with so crabbed a view of the legal prescription that government treat all citizens fairly, children and adults, would not be faithful to justice and constitutional tradition. As Justice Powell has recognized, members of the Court

> would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard [as minimum rationality] to every classification... we have recognized that certain forms of legislative classification ... give rise to recurring constitutional difficulties; in these limited circumstances we have sought assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state.[34]

Judge Bork's record with respect to racial discrimination -- a continuing scourge facing our nation's children and families -- raises special concerns. Judge Bork has criticized most of the landmark legal advances made in the civil rights field in the last 30 years. He has opposed the public accommodations provisions of the Civil Rights Act; harshly criticized Supreme Court decisions prohibiting enforcement of racial covenants in real estate transactions and outlawing the poll tax; and taken such a restrictive view of Congress' power to combat discrimination through legislation as to cast doubt on the constitutionality of provisions of the Voting Rights Act and the Civil Rights Act of 1964. Over the years he has demonstrated

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34. Plyler v. Doe, 457 U.S. 202, 217 (1983) (Powell, J., concurring) (emphasis added).

special sensitivity to the claims of the powerful majority and insensitivity to the legitimate grievances of racial minorities.

It would be hard to conceive of a greater disservice to this country and its next generation than reopening settled decisions protecting civil rights and undermining the consensus on basic racial questions we have achieved after decades of traumatic national debate and struggle. Judge Bork's appointment would be a giant step backward in our quest to extend the American dream to every child.

Protection from Harm for Children in State Custody.

Among the most vulnerable children in our society are those who become wards of the state because they have been abused or neglected by their parents, have been institutionalized on account of severe physical or mental handicap, or have violated the law. Our courts have long provided vital constitutional protections for these children.

The due process clauses of the Fifth and Fourteenth Amendments have been held to require that when the state becomes the custodian of a child, it assume the responsibilities as well as the prerogatives of a parent. As the child's caretaker, the state is obliged to protect the child from physical and emotional injury and to provide him with decent food, clothing, shelter, and medical care.[35]

These legal protections have immeasurably improved the lives of tens of thousands of children in facilities for handicapped

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35. E.g., Nelson v. Heyne, 491 F.2d 352 (7th Cir.), cert. denied, 417 U.S. 976 (1977); Gary W. v Louisiana, 437 F.Supp. 209 (E.D.La. 1976); NYSARC v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975). See also Youngberg v. Romeo, 457 U.S. 307 (1982).

and troubled youths. But Judge Bork would sweep these protections aside because they are based on the concepts of substantive due process that he abhors.[36] He would consign countless children to care that falls short of even minimal standards of decency.

Conclusion. Judge Bork is being touted by the Administration as a judicial conservative in the mold of Justice Powell, but his record belies this claim. He is an extremist whose confirmation would jeopardize well-established and important legal protections for children and families.

America's children are our nation's hope and our nation's future. As you know, your decisions as members of the United States Senate critically affect the lives and well-being of our children and their families. Your vote on the nomination of Judge Bork to the Supreme Court of the United States will be among the most important you ever make. We strongly urge you to reject his nomination.

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36. E.g., Franz v. United States, 712 F.2d 1428, 1438 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part); R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review 1, 11 (1971).

A POINT OF VIEW AGAINST CONFIRMATION OF JUDGE ROBERT BORK AS A SUPREME COURT JUSTICE

I have listened to most of what was televised by CNN of the Judge Robert Bork confirmation hearings and taken notes. I believe Judge Bork spoke in all candor, but that which he candidly expressed during the hearing is the strongest evidence of why he should not be on the Supreme Court. In referring to what he said I cannot quote verbatim, but I believe I have grasped the ideas he presented.

In sum, it appears to me that Judge Bork is intelligent and disciplined enough to follow the law and Supreme Court decisions when performing his duties as a judge in the court where he is, so he should be kept there and not allowed to have his undesirable views which he expressed during the hearing come into play on the Supreme Court.

What did Judge Bork express in the hearings that I deem undesirable? I wish to address the following:

1. His attitude toward the position of Supreme Court Justice
2. His idea of "redistribution" of rights
3. His "reasonable" test for equal protection under the law for the sexes and the races
4. His ideas related to the right of privacy
5. His distortions in his references to the Equal Rights for men and women Amendment (ERA)
6. The consistency I perceive in his changing politics

Of course I'm concerned about other issues, some of which will be addressed within the points above and others I will not address because I do not feel I'm well enough informed on those issues.

1. Judge Bork's attitude toward the position of Supreme Court Justice

Judge Bork, when asked, gave two reasons for desiring to be on the Supreme Court: (a) it would be an "intellectual feast" for him and (b) he would "leave a reputation as a judge who understands Constitutional government and structure." To me those reasons reveal he is more interested Robert Bork and his interests than in serving justice in our Nation and for its people. I find that undesirable.

Additionally, though the Constitution specifically articulates (something he likes) the appointment of Supreme Court Justices, he spoke disdainfully of the Justices not being elected. I find the contradiction and his disdain to be undesirable.

2. Judge Bork's idea of "redistribution" of rights

Judge Bork expressed the idea that when rights are extended, there is a redistribution of rights, that is, some people lose and others gain. That idea, I submit, stems from a confusion between power and rights. In an extension of rights whether it is by recognition of what further is included, by lifting a restriction that has been imposed on all or by extension to people denied the right before — yes, the power to impose the particular limit is lost — but everyone gains the whole of the right under law as it comes to exist. I find his idea of "redistribution" of rights to be undesirable.

3. Judge Bork's "reasonable" test for equal protection under the law for the sexes and the races

Whether Judge Bork views equality for the sexes as not being in the Constitution by virtue of the legislative intent of the 14th Amendment or, recognizing the Supreme Court has to some extent read "person" to include the sexes, he likes the "reasonable" standard, both views are deleterious to equal protection for the sexes (just as "reasonable" is for the races) and the latter view is the more deleterious because Bork's "reasonable" gives too much room

for unequal protection while making the average person think there is strong protection for them in the "reasonable" standard. I also submit that those who actively pursue unequal protection, especially for the sexes, understand that there is room for their views within Judge Bork's "reasonable" standard.

I think the assessment voiced by committee members and witnesses that Judge Bork has in the hearings provided a shift in his equal protection views is wrong. He hasn't really shifted. He's saying the same thing in different words, in fact in words that produce a sophism, that is, "reasonable" sounds great, but isn't great by virtue of what it means in Constitutional context—a meaning developed over the years.

Judge Bork said his "reasonable" standard is of 90 years existence, so it cannot be said he is proposing a new idea. I'll not present a complete review of "reasonable" related to equal protection, so let a little history suffice. Ninety-one years ago, 1896, in Plessy v Ferguson, 163 US 537, a law was upheld that called for "separate but equal" railroad seating space for the races and in that ruling "reasonable" appears thus: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class . . . So far than, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it." (pp. 550-51, underlining mine). I hope reading that is as painful to you as it was to me in typing it.

In his testimony, Judge Bork said the "reasonable" test had been used to discriminate against women (I add, more precisely, against men and women), because of outmoded stereotypes. Then later he said the "reasonable" test is not the same as the "rational" test used, he claims, in Goesart v. Cleary, 335 US 464, 1948, which ruling did discriminate against women. I counter that the "rational" standard was not proposed, defined nor applied in Goesart v. Cleary. It was really a continuation of the "reasonable" standard. In the ruling there is the statement, "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law," which is preceded by "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason." The ruling goes on to include: " Since bartending by women may, in allowable legislative judgment, give rise to moral and social problems, . . . the line they (Michigan legislators) have drawn is not without a basis in reason ....." (pp. 466-67, underlining mine).

Contrast the above with "rational" in Reed v. Reed, 404 US 71, 1971, though I quote from 30 L Ed 2d p. 229: "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation . . . of given sections of Idaho law)," said after the Court noted, "In such situations, section 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause," and said, " a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 US 412 . . . (1920)." The result was that the sex discrimination was not allowed to stand.

I submit the "rational" of Reed v. Reed, though including "reasonable," however strengthened by "not arbitrary," is a better standard than the "reasonable" and "a basis in reason" of Plessy v. Ferguson and Goesart v. Cleary and that Judge Bork

erred in his remarks about Goesart v. Cleary. I add that Judge Bork harks back to the old, unacceptable "reasonable" standard for both the races and the sexes in order to increase the future latitude for the States, but I do not believe he's going so far as aiming at a return to the specific outcome in Plessy.

The story of the standards used in judging sex-based laws under the Constitution, including the move to "exceedingly persuasive justification," Mississippi University for Woman v. Hogan, 73 L Ed 2d 1090, 1982 at 1097 and the consideration of "(intention) to attain a balanced work force" Johnson v. Transportation Agency, 94 L Ed 2d 615, 1987, at 635 is one too long to review here. I think, however, the "suspect classification, strictest judicial scrutiny, and the heaviest burden of justification" now used in judging race-based laws is a very good one and has enough latitude in it to be used to related to the sexes as well. I add I would rather see that achieved by Constitutional amendment, such as the ERA, rather than by Supreme Court ruling.

Regarding Judge Bork's views stated during the hearings, I submit (a) that he stongly desires to reinstate the old, unacceptably loose "reasonable" standard in Supreme Court adjudication of race-based and sex-based laws, (b) that he deviated from the truth in his remarks about Goesart v. Cleary and (c) that his promoting "reasonable" is intended to sound as if it is a great idea when it really isn't. I find all this undesirable.

4. Judge Bork's ideas related to the right of privacy

At the same time Judge Bork is saying there is no right of privacy articulated in the Constitution so there is no such right, he lists Constitutionally protected privacies that do exist. At the same time he is saying there is no right of privacy of one's body, he is pleading for maintaining the privacy afforded by separate men's and women's public restrooms. At the same time he stresses his commitment to that which is articulated in the Constitution, he finds Amendments IX and X of no consequence. I find these contradictions to be disconcerting.

In the hearings Judge Bork expressed concerns about the right of privacy recognized in Griswold v. Connecticut, 381 US 479, 1965. One type of his concern relates to finding the right in the Constitution or protected by the Constitution which he does not find because he discounts the 9th Amendment.

Another type of concern for him is the delineation of the limits of the right of privacy shown in his saying that in the Griswold ruling the right is generalized and undefined; we don't know what it covers, how about sodomy, drugs?; didn't define the right, why are some private acts protected as rights and others are not?; trouble was that Griswold wasn't clear what it covered, so could decide in another case the privacy right didn't cover same sex sexual activity; doesn't know what privacy covers, doesn't have a theory; he doesn't know if the Constitution protects a marital right to privacy; marital rights-wouldn't justify it if he can't find it in the Constitution.

I submit Judge Bork has the worthy goal of not extending the right of privacy to permit legalization of sexual activity between or among persons not married to each other, but what is "a puzzlement" to me is why he does not recognize and point out such limits delineated in Griswold v. Connecticut, Roe v. Wade, 410 US 113, 1972 and Bowers v. Hardwick, 478 US ___, 92 L Ed 2nd 140, 1986? Why doesn't Judge Bork talk about the following? In the opinion of the court and the concurring opinions in Griswold use of the terms "married," "husband and wife," "marital," "marriage" and "marry" appear at least 38 times in long discussions of the institution's due privacy. Then in Justice Goldberg's concurring opinion he said, "'The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. These statutes demonstrate that means for achieving the same basic purpose or protecting marital fidelity are available to Connecticut without need to 'invade the area of protected freedoms.'" He went on to say, "Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct," and he went on to quote something Justice Harlan had said in another case,"'Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.'" (at 498-499).

Going on to Roe v. Wade, note: "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . . (at p. 152), and "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. (at p. 154.) In Bowers v. Hardwick the Court said: "No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far." (at p. 146). The Court went on to say: "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as possession and use of illegal drugs do not escape the law where they are committed at home. Stanley itself recognizes that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. . . . And if respondent's submission is limited to voluntary conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road." (at p. 149).

I repeat what bothers me about Judge Bork's expressions re the definition of the right of personal bodily privacy: Why does he not refer to the limits stated in various rulings, especially given that he has a genuine concern to maintain those limits and especially when he has this rare opportunity to point out those limits to the American people? I truly believe Judge Bork is committed to the limits, so in the next section I'll venture an answer to my question.

I do not have the resources or the time at this point to read Judge Bork's rulings, but one discussed in the hearings involved women's sterilization in order to prevent lead injury to a fetus. I ask what kind of reasoning is it that says offering a choice to workers is not a hazard even though one of the choices is an assault on one's own body. Should coal miners be offered a choice to tie off their tracheas in order not to get coal dust in their lungs? I discuss this under privacy because I believe that is the topic involved when someone offers monetary benefit to another to alter his or her own private body in a way that lessens its capabilities.

I find undesirable Judge Bork's contentions (a) that the 9th and 10th Amendments are meaningless; (b) that there is no right of personal bodily privacy protected by the Constitution; (c) that, if there is such a right and it is protected, the right can't be defined or limited; and (d) offering the choice posed no hazard in the lead danger case.

(The following three paragraphs have nothing to do with whether or not Judge Bork should be confirmed as a Supreme Court Justice, but I wish to add these thoughts.

I submit by virtue of the 9th Amendment Americans have the Constitutional right of privacy to the extent the 10th Amendment power of the people and their check and balance government permits. I also submit there is a simple all-encompassing basic rule re who may engage in consensual sexual relationships: a man and a woman married to each other should and do have the right and persons not married to each other should not and generally do not have it.

I add, though, that I am disturbed by the common usage of the term, homosexuality to denote same sex sexual conduct. We do not use the term, heterosexuality when we mean opposite sex sexual conduct. Heterosexuality and homosexuality are emotional bents, not activities.

Judge Bork said he is looking for a formula that doesn't produce a contradiction in the extensive privatization of religion as opposed to the public's

involvement in individual behavior we call morality. I submit the formula lies in religion's being a situation of a very private human relationship to a Supreme Being and morality being a situation of relationships between humans that requires humans to deal with.)

5. Judge Bork's distortions in his references to the Equal Rights for men and women Amendment (ERA)

It's immaterial to his confirmation whether Judge Bork supports or opposes the ERA, but how he as a member of the judicial branch of our government talks about the ERA is important. Relative to this matter, the following from the Bible used as a literary statement identifies my two concerns: "For truth has fallen in the street, and equity cannot enter." (Isa. 59:14b). In this statement I wish to focus on the "truth" part. At one point during testimony of a witness, the idea came up that political hyperbole is something we have to put up with. I, however, cannot excuse as political hyperbole certain specious things about the ERA Judge Bork said during the hearings, especially since his serious and actual views are what the Judiciary Committee rightfully expects to hear.

Some things Judge Bork said about the ERA were in the vein that is odd to put decisions in the hands of judges without legislative guidance, conceding he had said the ERA underwrote a "dangerous Constitutional revolution" because it puts lawmaking in the hands of judges, not the legislatures and Congress; that legislatures would have nothing to say, people would go straight to the Courts and challenge endlessly. His remarks were not only gross exaggerations, but fly in the face of Section 1 of the ERA being addressed to the United States which includes Congress and to the States, of Section 2 being addressed to Congress and Section 3 giving Congress and State Legislatures time to revise laws where needed before the Courts have authority to act.

On the other hand, Judge Bork is strongly disturbed that, without the Court acting first, Congress can find reason to enact appropriate legislation to overturn laws that relate to those Constitutional provisions in Amendments 13, 14, 15, 19, 23, 24, 26 and could under the ERA. The Congress has been granted that power in the Constitution and the Court confirmed it in Katzenbach v. Morgan, 384 US 641, 1966.

The whole excess of condemning both the judicial system's role and the Congressional enforcement role is one facet in the Far Right's anti-ERA rhetoric and I submit Judge Bork joins in that rhetoric of distortion.

Additionally, about the ERA, Judge Bork said on one hand he thinks the ERA is all right if (emphasis mine) it establishes the "reasonable" test and, on the other hand, said that the ERA presents no basis upon which to make any distinctions between men and women. I weigh those statements in the light of his strong support for interpreting according to what is written and said as the legislative intent in addition to the text and precedent—all of which I think is very good. Thus, given the extensive record of legislative intent of the ERA and the established standard of review related to the ERA's text, Judge Bork need not act as if he can't know the standard and he need not contend that it involves no distinctions. He referred to restrooms and combat, specifically, as areas calling for distinctions. The legislative intent of the ERA calls for maintaining separate restrooms for the privacy of men and women, but it sees combat roles for men and women as each individual qualifies.

The whole excess in saying the ERA's meaning is clearly no distinctions and that its meaning can't be ascertained from the precedent embodied in the text nor from the stated legislative intent of the Congressional proposers is another facet in the Far Right's anti-ERA rhetoric and I submit Judge Bork joins in that rhetoric of distortion.

Now back to the right of privacy. The first I ever heard it proclaimed that there is no right of privacy was in the Far Right's anti-ERA rhetoric and I venture a guess Judge Bork joins them in that excess.

I find the kinds of things described above that Judge Bork said during the hearing about the ERA in the light of his own guidelines for interpretation of any Constitutional provision to lack the integrity a Supreme Court Justice should have and to be evidence of his current political extremism, that is, the Far Right. These points add to my reasons that he should not be confirmed.

(I'd like to go back to Katzenbach v. Morgan. Although condemning it is prominent in the anti-ERA rhetoric of the Far Right and although Judge Bork says excessively that the ruling allows Congress to change the Constitution by statute, I think the issue of whether or not Congress can overturn a Supreme Court ruling is worth pondering. Judge Bork also said that if Congress can overturn Supreme Court rulings that could be a disaster for minorities. I think they need not be worried. I submit, the matter turns on whether the Supreme Court struck down or upheld the State or Federal law. Laws that are struck down as unconstitutional should not and cannot be re-instated by any State or by Congress. However, a State law that was upheld by the Court can be repealed, modified or supplanted by a State and the same for Congress regarding a Federal law. Following that pattern then, Congress, cannot re-instate any law the Court has overturned, but it seems to me a State statute upheld or not yet acted upon by the Court can be outlawed by Congress as long as the legislation is appropriate to those particular amendments that contain the Congressional enforcement clause. The Court itself has struck down laws it previously upheld and has in one instance I know of re-instated a law it previously struck down—one involving treating men and women differently relative to a minimum wage. I don't have time now to learn if there are other such instances—are there or is this one a rarity? Itmakes sense to me for the Court to strike down laws that it has previously held Constitutional, but it doesn't make much sense to me for the Court to re-instate as Constitutional laws it previously ruled were unconstitutional. However, regardless of that, it seems to me Judge Bork is right when he says neither the States nor the Congress can re-instate a law the Court has ruled unconstitutional; but, I submit, one that has been upheld or not ruled upon is another story.)

6. The consistency I perceive in Judge Bork's changing politics

Judge Bork explained that he has at different times been a Communist, a Socialist, a Libertarian and now I submit his views show him to be a Far Right Conservative, though he does not identify himself as such. He has the right to be any of these and I do not fault him for changing from one to another, but the consistency I see is his bent to explore the theories of the extremes. The Supreme Court is not the place for such an explorer.

In conclusion I say that I feel for Judge Bork as a person and am sorry he'll experience the emotion of disappointment if he is not confirmed, but our larger concern must reach further than one person. I believe things I've presented that Judge Bork himself said in the hearings are not things good for our country and people, therefore, show he should not be confirmed to be a Justice on the Supreme Court.

Thanking you,

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September 26, 1987

Editor
The Wall Street Journal
200 Liberty Street
New York, NY 10281

Dear Editor:

I write in response to L. Gordon Crovitz's op ed piece published on Tuesday, September 22nd. Mr. Crovitz takes a narrow view of the principle that we should be ruled by law rather than men; he also uses straw men to ridicule controversial Supreme Court opinions and those testifying against Judge Bork's nomination.

As a people we are enthusiastic about our Constitution. We view it as a bulwark of liberty. Lawyers and judges aside, we do not distinguish between the Bill of Rights and the Constitution.. Supreme Court opinions upholding liberty figure prominently in our view of the Constitution. Without these opinions -- and the hope which they provide -- I doubt minorities and the disadvantaged would share fully in the Bicentennial celebration.

It is not surprising, therefore, that those who are consoled by Supreme Court opinions on liberty would align themselves against Judge Bork. Rightly or wrongly, they believe Judge Bork's appointment would substantially reduce prospects for further consoling opinions on liberty from the Supreme Court. Some statements of Judge Bork's supporters, including Mr. Crovitz's ridicule of the "penumbra" metaphor used by Justice Douglas in articulating the right to privacy, harden those concerns.

It is often difficult to articulate basic constitutional principles so that their application to specific cases is explicit. If we have regard for ordered liberty we cannot shirk this task simply because there is a risk of failure or abuse. To say, as Mr. Crovitz does, that fresh articulations of basic principles are no more than the personal political and social views of their judicial authors is to beg the question. It is fair to ask whether a

particular articulation is fashioned in accordance with the rule of law, or whether it is merely the personal view of a particular judge.

The rule of law in Anglo-American jurisprudence has long been more than a reference to the words enacted by duly constituted framers. The founding fathers were well aware of their heritage. The British have no written constitution, and still take refuge in the common law. The words and wisdom of judges, accumulated slowly in the course of concrete cases, are an integral part of our system of law and of our Constitution. We have not taken the approach of post-Napoleonic Europe, which relies much more heavily upon enacted words and much less upon judicial precedent. It is not that "strict construction" is unreasonable: it clearly is not. But it is not our heritage.

I take it that those who advocate "strict construction" and adherence to "original intent" do so because they disagree with particular Supreme Court opinions, or are concerned that these opinions make law out of "personal" views. Fair enough. But is it necessary, to safeguard against the latter possibility, to read out of the Constitution the language and principles which most inspire the people? It is inadequate to argue that because broad and principled language can be read any number of ways it therefore ought not to be read at all. That argument tends toward a perverse and bureaucratic result: basic principles are subordinated or ignored because their application to concrete cases is difficult to discern.

Judicial precedent protects against this tendency. Judges take small steps in specific cases to make the connection to broad principles; where the steps are small enough to withstand rule-of-law scrutiny, they withstand the test of time and make subsequent applications easier to discern. The incremental nature of the process provides a natural safeguard against the "personal" views of any particular judge. In the end, judicial precedent is collective rather than personal; it provides a powerful and enduring mechanism for collective discernment of basic constitutional principles. It makes the difference between a noble document and a piece of parchment, particularly with regard to liberty.

Is judicial precedent consistent with "original intent"? If one judges by the framers' expectations, probably not. But what about their aspirations? The founding fathers were a remarkably realistic lot. "[E]experience proves the inefficacy of a bill of rights on those occassions when its controul (sic) is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed by a popular current." (Madison to Jefferson, 10/17/1788).

Madison went on to make two apparently conflicting points: first, he said that a formal declaration of rights would "acquire by degrees the character of fundamental maxims of free Government, and as they become

incorporated with the national sentiment, counteract the impulses of interest and passion"; second, he suggested that the rights be declared in limited terms so that they would bend but bounce back after attack by the "popular current". Jefferson agreed that while a "positive declaration of some essential rights could not be obtained in the requisite latitude . . . [h]alf a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." (Jefferson to Madison, 3/15/1789).

The process of judicial precedent elegantly reconciles the expectations and aspirations of the founding fathers. They have reason to admire how we have carried forward their work. To say, as Mr. Crovitz does, that the process "creates rights" not expressly stated is superficial and in any event misses the point. "Strict construction", by tying the progress of liberty to the horsecart of majority enactments, ignores the soul of our Constitution. Without that soul, how can the Constitution continue to command the respect of the least of us? What does it matter that it commands the respect of the majority? Majority will is sufficient to govern but not "to secure the blessings of liberty to ourselves and our posterity."

Consistent with our common law heritage since the Magna Carta, basic principles have by degrees acquired specific meaning when judges have been called upon to decide specific cases. Are those developments to be discounted in order to preserve the logic of "strict construction"? It was clear to some of the founding fathers that "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents", that in the hands of an independent judiciary the Bill of Rights would serve as a "legal check" against this invasion, and that while this "may cramp government in its useful exertions" the resulting inconvenience is shortlived. (Madison to Jefferson, 10/17/1788; Jefferson to Madison, 3/15/1789).

Is Mr. Crovitz's argument against "personal" views a straw man? Is his argument more fundamental: that judicial precedent is not a valid source of Constitutional language? More to the point, what is Judge Bork's view? To put the matter baldly, there are only two ways to give meaning to basic principles of liberty and still operate under the rule of law: first, rely upon the framers or upon subsequent legislatures for the necessary specificity; second, rely upon judicial precedent. As Jefferson and Madison saw, the first approach is problematic precisely in those situations where liberty is most at risk: where the majority is unwilling to place themselves in the shoes of their less advantaged fellow citizens.

The second approach is a practical -- and historically authentic -- supplement. What argument is there to abandon it and rely exclusively on "enacted words"? There may be some judges who have such intellect that they can discern the application of basic constitutional principles in specific cases without the aid of precedent. Even if Judge Bork is one of those, it would surely be incautious to argue that the rest of the judiciary should

abandon reliance upon judicial precedent for Constitutional language. And it would be most incautious indeed for the Supreme Court itself, through five of its members, to enforce such an approach.

Yet such appears to be the thrust of the "strict construction" and "original intent" school that has had great influence of late on appointments to the Supreme Court. Judge Bork's allowance that he would abide by precedent does not suggest a deep and abiding commitment to precedent. He has a clear recognition of the difficulty of discerning concrete meaning in broad statements about liberty; but his response has not been to seek recourse in precedent. The logic of precedent meanders like a river; the good judge prefers a straight line. In this he is not alone, even on the Supreme Court.

There is a seductive charm to "strict construction" and "original intent", primarily as a counterweight to abuses of precedent by Solomonesque members of the judiciary, who may be faulted for impatience with the progress of liberty. Precedent is, after all, a rigorous task master. But by the same token precedent itself provides correction for these abuses, such as they are, if we will just have patience. Judicial precedent has served us tolerably well since Runnymede. There is no need to seek a remedy in "strict construction."

The founding fathers anticipated the difficulty which we have with liberty. Madison argued that the dynamic between government power and liberty in America is this: that when government restraints upon liberty are below a certain level, there is a tendency toward further relaxation "until the abuses of liberty beget a sudden transition to an undue degree of power. . . . It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power; and that the line which divide these extremes should be so inaccurately defined by experience." (Madison to Jefferson, 10/17/1788).

Justice Douglas may have been bold in using the Bill of Rights as a "legal check"; Justice Powell may have been cautious. Would Judge Bork give such play to analytical purity that he would be neither bold nor cautious, but simply abstain? If he would let liberty stagnate by default -- for no better reason than the difficulty of discerning how basic principles apply to specific cases, or because he rejects in principle reliance upon precedent for Constitutional language -- he ought not to be confirmed as a Supreme Court Justice.

Sincerely,

Clyde R Christofferson

CITIZENS' ADVISORY COMMITTEE
THE DISTRICT OF COLUMBIA BAR

October 2, 1987

Honorable Joseph Biden
Chair, Committee on the Judiciary
United States Senate

Dear Senator Biden:

I write at this time on behalf of the Citizens' Advisory Committee to the D.C. Bar to urge the Senate to oppose the confirmation of Robert H. Bork as an Associate Justice of the Supreme Court. The Citizens' Advisory Committee to the D.C. Bar is a diverse aggregate of nonlawyers who live or work in the District of Columbia; we serve as the "principal link" between the city's legal community, a total of 28,714 lawyers who live and work in the area and a grand total of over 45,000 lawyers who hold some form of membership in the Bar, and approximately 638,000 citizens and potential consumers of legal services.

Judge Bork as a professor of law and as a jurist, has made numerous pronouncements in a variety of forums over the past 25 years that reflect a consistent theme of extreme reactionary "conservatism". Indeed, Judge Bork's long and articulate history of opposition to civil equity for black americans and his apparent inclination to limit, if not vanquish individual rights brings into question his ability to hear matters dispassionately and to judge without preconception or prejudice.

Judge Robert Bork opposed the passage of the 1964 Civil Rights Act barring discrimination in public accommodation; he has stated that the Supreme Court erred in upholding provisions of the 1965 Voting Rights Act banning the use of literacy tests; he has gone on record as opposing the Court's invalidating of poll taxes; he has expressed vigorous opposition to the Supreme Court's decision establishing the rule of "one-person-one-vote"; and he argued that the constitution does not protect the right to privacy and that the entire line of Supreme Court decisions vindicating such rights is improper.

In addition, Judge Bork has also advocated an easing of the exclusionary rule; we feel that this rule serves as a barrier against unreasonable, unnecessary and unacceptable searches and humiliation for all citizens. It is a vital protector against the potential erosion of the fabric of our moral, democratic and civilized approach to the administration of justice in this, a free society.

Finally, Judge Bork's unsuccessful recantation of his views in support of a majoritarian domination of the society without care given to the protection of the individual rights of the minority, also brings into question his capacity to be sensitive to the needs of the weak, the less fortunate or the situationally powerless in our society; his views on this subject also raise grave concerns about his facility and commitment to temper all findings of justice with mercy.

It is our belief that in a moral and free society there can be no justice without mercy. Indeed, we believe that Judge Bork's theories and actions render him incapable of standing as a "plumb line" of moral and legal authority on the court of final appeal; we doubt his ability to interpret the constitution of all of the people of this great land and inturn, implement justice for all of the people with equity and fairness.

We contend that Judge Bork's deeds speak for themselves. He was, he is, and if the best predictor of future behavior remains to be past behavior, he will likely continue to be a reactionary political philosopher and judicial activist; and, in the light of his past actions and numerous pronouncements, we believe that he will not hesitate to eviscerate settled law that has established civil rights and that has articulated individual freedoms, such as the right to privacy, if he is confirmed to the Supreme Court.

It is for these reasons that we oppose Judge Bork's confirmation. It is our sincere hope that the Senate will move swiftly, for these same reasons, to speak out in opposition and vote not to confirm Judge Bork as an Associate Justice and deny him the privilege to sit on the "highest court" in our land.

I am, very truly yours,

Chauncey Fortt, Ph.D.

Chauncey Fortt, Ph.D.
Co-Chair

CITIZENS AGAINST BORK*

Robert H. Bork (voiceover)

"I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons--one is historical and traditional, the court has never thought that precedent is all that important. The reason being..."

Terence O'Rourke
Senior Assistant
Harris County Attorney:

"When I was a kid I was a pageboy in Washington D.C., I worked for Senator Ralph Yarborough of Texas, I learned how important or how much attention members of the Senate paid to their mail and so right now probably one of the greatest cards and letter campaigns maybe in the history of our country is under way. What we're doing is going to people who have sincerly strong feelings in opposition to the nomination of Robert Bork, trying to get them a chance to be, to present their image to the Senate Judiciary Committee."

Patricia Gray
Trial Lawyer:

"My name is Patricia Gray and I'm a lawyer practicing in Galviston, Texas. Like most lawyers, I've been following the confirmation debate on Judge Bork. Last night I watched the opening remarks that were filmed on C-SPAN and I was particularly impressed with Judge Heflin's remarks, Senator Heflin's remarks. He talked about the fact that judges make decisions affecting real people in real situations. But it concerns me to think that under Judge Bork's philosophy, legislators could pass whatever laws they want and there would be no solution for citizens through the courts. People look to their courts for justice and that's what I'm concerned we won't have under Judge Bork's philosophy."

unidentified:

"Although Judge Bork's opinions as expressed in academic debate are not particularly disturbing to me, I know, from where I grew up, that if those opinions had been expressed by a southern judge, even in academic circles, that this committee wouldn't even consider confirming him. That's regional prejudice--the fact that he said them while at Yale doesn't make them any more acceptable."

Lupe Salinas
Federal Trial Lawyer:

"At what we have, we need to keep. We do not have anyone else on there that will...say...that they will respect the laws at

*Tape transcribed for submission in the record.

the stance that he wouldn't rush to revise the law. Well we're concerned. When you see a headline something like this, it says,'Bork says he wouldn't rush to revise the law' well, we're concerned with the subtitle that might be found thereunder, 'but he'll do it as soon as he gets his opportunity.' We are celebrating the 200th annniversary of our constitution and yet we have to deal with the question as to whether or not any of those constitutional rights are going to be further abrogated by an individual who will make up eleven percent of the vote on the Supreme Court of the United States. There are other decisions that he is critical of such as the Bakke case in 1972 or 1973 which was very, very moderate, very, in many regards, conservative but yet Robert Bork would oppose that. And the only thing that it did that explains the opposition, on his part, is that they said that you could consider, among many factors, whether or not a person is a minority in questions of whether or not that student will be admitted to a law school or a medical school or some other type of professional institution. So I ask, once again, the Senate Judiciary Committee to please vote against the nomination of Robert Bork to be a United States Supreme Court Justice."

Rod Gorman
Business Lawyer:

"My opposition, Mr. Bork, I think, is a little different from other people's. I have had the opportunity to meet Mr. Bork back in 1973 and 1974 when I was an Assistant Attorney General for the state of Texas. At that time Mr. Bork was the Solicitor General of the United States. I was representing the state of Texas in a petition that was filed with the Supreme Court suing the state of New Mexico over the Pecas River Compact. New Mexico had been stealing water that had really belonged to Texas for about twenty years. Mr. Bork's representation and some of the delays that were caused by him affected our litigation. At that time I had the opportunity to meet Mr. Bork very informally. Mr. Bork is obviously a brilliant man but his brilliance is kind of overshadowed by his arrogance. The federal judiciary generally, in my opinion, stands in bad stead with the American people because of an arrogant attitude...Mr. Bork, is, in my opinion, insensitive to people. No doubt that he is a brilliant man, but he is not the type of person that I feel should be the man that has the power to perhaps change the whole course of government as a justice on the Supreme Court."

Sharon Middleton
Legal Assistant:

"I live in a little, rural, hick town close to here called Albin and went out to dinner the other night and other people in Albin know that I'm a legal assistant. A lot of those people came up to me in the restaurant to say, 'I don't want Mr. Bork to be on the Supreme Court. What should I do?' One gentleman in particular, Mr. Parks, who owns the restaurant, came up to me

and said, 'You know girl, I don't think that man's telling the truth and I don't want a man like that on the Supreme Court! What do I do?' and I said, 'Well, I think you ought to write your Senator and tell him that.' All I can say is, I think there's lots of people out here, not just in this law firm, but out here, in the little towns in the heart of America that really don't think that Mr. Bork should be on the Supreme Court and I hope that the Senators hear this. Thank you."

Nikki Van Hightower
Harris County Treasurer:

"I'm Nikki Van Hightower, the Harris County Treasurer, and I have been asked to give some of my positions on the Robert Bork nomination for the Supreme Court. And I do have some very strong feelings about it. As a member of a group that was originally outside the protection of the Constitution, and who has relied on the Supreme Court and the other branches of government to extend the protections of the Constitution to us I think it's very, very important for me, for all women, for all people who were initially excluded, and for the history and for the future of this country that this nominee and his nomination be rejected. He has made it very, very clear that he feels that the Roe v. Wade decision regarding a woman's right to choose abortion and in his rationale for his opposition to that decision he has made it quite evident that he really doesn't believe that the Constitution protects the right to privacy. That should be a threat to all of us because that means that our bodies, marriage, and family life really do not have the protection of the Constitution and I think that these are things that need to be carefully considered in his nomination process and I feel very strongly that this nominee, Robert Bork, should be rejected as a Supreme Court Justice and we should stay with the progress that we have made in extending civil rights and giving people the constitutional protections that we all deserve. Thank you."

Rose Ann Reeser
Assistant Attorney General:

"As a law enforcement officer in the state of Texas, I'm charged with enforcing state law, and I'm proud to enforce the state law in Texas. The statute that I work most with is the Deceptive Trade Practices Act in which our duty is to protect consumers, individual consumers and legitimate businesses from the fraudulent practices of illegitimate business. And I'm very concerned that Judge Bork's record on business regulation, which appears to favor the complete deregulation of business practices, would remove the protection that we're used to experiencing and that we have come to depend on both as citizens of Texas and as citizens of the United States, that businesses can only operate within certain parameters. I'm concerned with his stance on price regulation that a manufacturer apparently should be able to dictate to his

retailers the price that we're going to pay for consumer items. I don't think this is the sort of society that we want to live in."

Laura Hubbel
Probation Officer:

"...I'm the one that advises these probationers just how it's going to be and how the game is going to be played and if they don't do that then are going back to the penitentiary. They either comply with the strict conditions of probation and they either do it very, very well or they're history. I'm a capable and competent and educated woman. I don't think that sex has very much to do with a person's ability. I think that Bork has tried to portray the color of a man's skin or the shape of their skin to make legal issues. I'm greatly disturbed about how women will fare if Bork does get the nomination...greatly disturbed. I do believe, I do believe that there is a growing movement in this country to change the abortion laws, to have it go back to where legal abortions are illegal, financial funds to be used for abortions for low income people - if people can't even afford abortions how the hell can they afford to even raise a child? I know that women will be going back to having back street, coat hanger abortions. They'll be inducing drugs, they'll be going across the border. They'll be doing anything to get abortions, and I am very, very concerned about that one particular issue with Bork and his vision of life in the future for women, and blacks, and all peoples of minorities."

James Coats
Tax Attorney
Lawrence Michael Co.:

"I look back to when he was Solicitor General, I'm a lawyer, was a treasury agent, was in the chief counsel's office of the Internal Revenue Service in Washington. I know how hard it is to enforce the law, and I know how hard agencies work to enforce the law, the intent of Congress. And as Solicitor General, he failed to respond on the behalf of the agencies in half the United States on matters of voting rights and housing. For the United States to have taken a position by the Department of Justice plus the agencies to a point where the respondents to a writ of certiorari and then simply not to respond is unconscionable. It is the duty, it seems to me, of the Solicitor General of the United States to represent the United States which includes its agencies and includes its Congress. And Solicitor General Bork simply chose to stand mute. And standing mute raises issues that are unbelievable. In an adversary system there is simply nobody on the other side arguing...Congress is sitting there, voted, they're elected, Bork wasn't, yet he could betray the entire intent of Congress. The law was passed, the law was affected, application of the law was affected by the agencies. The Justice Department took

it to trial, took it to appeal. And then it got to the Supreme Court, and Bork aborted it. That's all I have to say. It's the full story."

Margie Harris
Attorney at Law:

"My name is Margie Harris, I'm an attorney who practices law here in Houston, Texas. I've been practicing for about six years now, but two of them were spent with the federal district court. While in law school, and even while clerking for the federal district court judge, I got to study constitutional law. Constitutional law was one of my favorite courses in school, in fact, because you see the delicate balancing that the judges must do when they're faced with a conflict between a majoritarian decision and the rights of particular individuals. I admire the document, the Constitution, particularly because it does take into consideration the rights of individuals. Because of this concern for the Constitution, I am terrified that Judge Bork might be appointed to the United States Supreme Court. It's one thing to have a judge of a particular philosophical bent on a lower court; on the district court level, even on the circuit court level, because that person is always reviewed, or can be reviewed. There is no review of the United States Supreme Court's decisions, however. We know, I know, what Judge Bork will do when he is on the Supreme Court, with respect to the right to privacy. What he's saying now, in the hearings, are rhetoric. He knows that whatever he says now nobody can impeach him for later. He can say wonderful things, nice things, conciliatory things, about, oh, 'women are guaranteed rights under the Constitution,' but every bit of his writing over the past twenty years up until a few weeks ago has said that women are not protected under the Constitution, they do not have privacy rights...."

University of Houston Law Center
Jordan Paust:

"I'm Jordan Paust, law professor at the University of Houston Law Center. I teach human rights, public international law and areas of constitutional law as well. My fundamental concern deals with human rights and the expectations of the framers, the founders of our republic and our Constitution over 200 years ago. One wants to know really whether anyone should sit on the U.S. Supreme Court that is ignorant of that history. In Tel-Oren v. Libyan-Arab Republic, Judge Bork was one of the judges that dismissed the case on jurisdictional grounds, arguing that there were no human rights, basically, in 1789, no concept of fundamental human rights. And that's completely in contrast with our history, the whole purpose of having the Declaration of Independence and the Constitution in the United States, and the Ninth Amendment itself. One of his colleagues, for example, Professor Myers McDougall at Yale Law School, who taught with Judge Bork, and Myers McDougall, in fact, has

taught at Yale Law School longer than any other professor in the history of the law school, he said of Tel-Oren that the decision was the result of ignorance and he was very much opposed to the approach of Judge Bork at that time."

Gwenn Murphree
Law Student:

"After the hearings started, and listening to Judge Bork, I find that personally I don't think that he is as intellectual or as cerebral as most people seem to think. He has waffled on some of his positions and when pinned down by members of the committee, particularly Senator DeConcini, he has not really come through with an answer that is satisfactory to me and I was pleased to see the Senator, DeConcini, not let him get off into unisex toys and arguments of that kind which had nothing to do with his position on the Supreme Court."

Robyn Spalter
Law Student:

"...is against issues that have been before the Supreme Court in the past that have been close votes, and he could be the swing vote to take away basic rights, such as the right to privacy. One of the things that really scares me is watching him on the hearings and to watch him -- He's fooling the American public. I think he sits there and he argues that he believes those rights exist but he doesn't believe they exist the way they've been proved up before, but his writings prove that he doesn't even believe the right to privacy exists anywhere."

Carla Bacri
Law Student:

"They wrote their document for their own time, but it's a living document because it can still be used in our time. But in order for it to be effectively used, it must be interpreted in terms of our times and for our needs."

Jerry Scheff
Law Student:

"...believe that Robert Bork fails to bring to the Supreme Court, or would fail to bring to the Supreme Court, the breadth of understanding and the depth and compassion of feeling which have made the court the institution for social change that has been since 1954 when Brown v. Board of Education was first decided."

Sadhu Khalsa
Sikh Minister:

"My name is Sadhu Khalsa. I am an American citizen. I was born in the United States of America. And I've come before this video camera today because my consciousness is deeply troubled concerning the nomination of Judge Bork to the highest court of

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THE WALL STREET JOURNAL TUESDAY, SEPTEMBER 22, 198

Meet the Legal Extremists

By L. Gordon Crovitz

Judge Robert Bork proved last week that his views are more mainstream than his critics advertised. Now, many of his former colleagues in academia, testifying against Judge Bork's nomination, are about to show the public what extreme theories about the law look like.

Consider Owen Fiss, Judge Bork's successor as Alexander Bickel professor of public law at Yale Law School, who is one of several Yale professors scheduled to testify against the nomination. The day after President Reagan's 1984 landslide victory, Mr. Fiss boasted to a class that "not only do I not know anyone who voted for Ronald Reagan, I don't know anyone who knows anyone who voted for Reagan." A first year student from Utah stood up to broaden Mr. Fiss's horizons. "Here I am, Prof. Fiss," he said.

Mr. Fiss may have been engaged in some hyperbole about political homogeneity, but maybe not. Yale Law has a strong reputation dating from the New Deal as a liberal institution. Judge Bork was a token conservative during the 15 years he taught there. Dean Guido Calabresi has told the conservative and libertarian students in the Federalist Society that they are the law school's "most isolated minority." The Yale Law Journal organizers of a recent debate on the Bork nomination found five professors to speak against Judge Bork and only one, antitrust and torts expert George Priest, who favored the nomination.

Philosophers of Activism

The theories of the anti-Bork academics are provocative and stimulating, just as Prof. Bork's were, but these professors' understanding of the role of lawyers and judges in our society could not be more different from his. The American public, reeling from the litigation explosion and general ubiquitousness of lawyers, should pay special attention to the testimony of these philosophers of activist jurisprudence. These law professors have spent their careers justifying an ever-expanding role for judges. They dismiss the idea that judges should limit themselves to enforcing the rights actually protected in the Constitution.

In contrast, Judge Bork's judicial-restraint approach is based on the idea that the unelected judges must be the "least dangerous branch." Judges should set aside laws only if the text or structure of the Constitution demands it. It is illegitimate for judges to create new rights to further their personal views or the power of their branch over the legislative and executive branches. Judge Bork has been perhaps the leading critic of judges arrogating power to themselves at the expense of the elected branches of government.

Not everyone regrets giving more power to the judiciary. Mr. Fiss is well-known for his proposals to expand the role of judges through new court powers and procedures. He wants the courts to have the power to make what he calls "structural injunctions," which would go well beyond the traditional use of injunctions to order someone to stop an activity or to take a specific action. Instead, Mr. Fiss says his new injunction would give judges long-term powers to "effectuate the reorganization of an ongoing social institution."

The anti-Bork professors have spent their careers justifying an ever-expanding role for judges.

Mr. Fiss argues that social engineering by courts became legitimate when judges began to use wide powers in the 1950s to run school systems. Their injunctions affect groups, not just individual litigants. Mr. Fiss does not flinch from endowing judges with powers more legislative than judicial. He urges that this power be used "not just to vindicate a claim of racial equality, but also to vindicate other claims, such as the right against cruel and unusual punishment or the right to treatment."

What constraints would limit judges? Not original intent, which Mr. Fiss ridicules, but the "disciplining rules" of lawyers' "professional grammar."

In a Yale Law Journal article entitled "Against Settlement," Mr. Fiss even praises litigiousness. He says that out-of-court settlements should not be too strongly encouraged. Instead, he says the purpose of litigation is not to resolve disputes between litigants, but the "more public" purpose of "using state power to bring a recalcitrant reality closer to our chosen ideals." In his view, the amount of litigation in the U.S. "should be a source of pride rather than shame."

Paul Gewirtz, another Yale law professor, will also argue against the elevation of Judge Bork. Mr. Gewirtz is a strong proponent of the "generalized" right to privacy, grounded not in the Constitution, but, as Justice William Douglas put it, in the "penumbras, formed by emanations" from the Bill of Rights. Mr. Gewirtz has criticized the recent *Bowers v. Hardwick* opinion, which upheld Georgia's anti-sodomy law, as "superficial, peremptory and insensitive." The case was a landmark defeat for activist lawyers.

Justice Douglas discovered the penumbra-based "right to privacy" in the 1965 *Griswold v. Connecticut* case invalidating the state's anti-contraception law, which had been brought by liberal law professors at Yale. As Judge Bork testified, Connecticut had never used the 1879 statute to prosecute anyone for using contraceptives; the professors used this test case as an opportunity for an activist court to "discover" a new right. Similarly, in *Bowers v. Hardwick*, Georgia had not charged the plaintiff with breaking the sodomy laws. Instead, the case was urged by civil-rights groups hoping for another *Griswold*-style expansion of the court's role in invalidating dead state laws. After *Bowers v. Hardwick*, these groups might be more likely to lobby state legislators to remove offensive and unused laws from the books instead of rushing to the courts.

Stanford's Thomas Grey is another Bork opponent who will tell the senators that judges need not be bound by the Constitution. This is the bicentennial of something, but in a law review article entitled "Do We Have an Unwritten Constitution?" Mr. Grey answers yes. "There was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status," he writes. The job of the courts is to locate "unwritten but still binding principles of higher law."

Harvard's Laurence Tribe, who is scheduled to appear today, is another opponent of original intent. Mr. Tribe says original intent can "be used to pave the road to a kind of constitutional hell, an oppressive vision of greed in the corporate board room, jingoism in the White House and government as Big Brother in every bedroom in the land."

Mr. Tribe will probably be asked about "God Save This Honorable Court," the book he recently wrote to justify rejecting court nominees who believe in what he calls "the myth of the strict constructionist." The theme is that senators should ensure that President Reagan cannot alter the balance of the court from the current liberal consensus. Mr. Tribe urges senators to reject nominees on the basis of their "political, judicial and economic philosophies."

One member of the Senate Judiciary Committee has already pointed to a flaw in that argument. Last year, Sen. Orrin Hatch (R., Utah) reviewed the book in the Harvard Law Review. He wrote that Mr. Tribe's anti-Reagan "slant prejudices its persuasiveness." He added—perhaps as a warning to Mr. Tribe, who is a potential Democratic judicial nominee—that one "problem with a partisan approach to this advice and consent process is that such an approach engenders political reprisals."

Sowell's Support of Bork

Several law professors will testify on behalf of Judge Bork, including Paul Bator from the University of Chicago and Yale's Mr. Priest. Another forceful advocate from the academy will be economist Thomas Sowell of the Hoover Institution, who is scheduled to testify today. Mr. Sowell has written that activist judges have made the law more unpredictable, endangering the rule of law. They have also "imposed adventurous social policies—policies almost invariably opposed by the general public."

Mr. Sowell disapproves of the power that activist judges have assumed over so many areas of political and social life. He says that one reason he supports Judge Bork's nomination is that the courts have become "the favorite way of doing an end-run around the democratic process and imposing the ideas of the anointed."

The liberal critics from academia owe their substantial reputations to making judicial activism legitimate. Judge Bork has now forcefully denied the legitimacy of this method of judging. At stake is much more than points in an intellectual debate. At stake is whether the branch of government charged with the leading role in interpreting the Constitution should still take the document seriously.

Mr. Crovitz, Yale Law '86, is assistant editor of the Journal's editorial page.

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our land...Now if you look closely at me you can see that I'm different. I look different, but I really don't act different. But what I really do appreciate in life is my ability and my inalienable right to be as I am...Jesus said a man can't serve two masters. And neither can a person be a judge and say one thing as a professor and be a professor and say another thing as a judge, because when the mind speaks, the lips say what the mind says. And in this man's mind, he's speaking what he feels and what he believes. And to say that he is a professor and he says one thing and he'll say another thing as a judge, either tells me that as an individual he's terribly confused or else he doesn't say what he speaks, and therefore he is a liar or finally, he speaks what other people want him to say and not what he believes. And of those situations -- all three are not acceptable. Thank you very much for listening to me. Please make the correct decision."

Anthony Hall
City Councilman:

"...and unless there is something far more revealing about your thoughts and his ability to view this nation as one, I could not vote for him and would encourage every member of the Senate not to."

Frank Thompson
Chairman
Texas Human Rights Commission:

"This country all of a sudden went to the far left and now we have gone to the far right. We need to come back to being center."

Saundria Chase
Tax Lawyer:

"It seems that President Reagan has had the opportunity to not only control, but sort of form a miniature hierarchy in the Supreme Court that is going starkly to the right."

Shiela Jackson Lee
Attorney at Law:

"I think you ask a very serious question and I think that what we are talking about really will set the tone of legal history or the future of this nation for many years to come. From that perspective I have thought and slept on and analyzed what a Bork nomination and eventually a Bork service would bring about. And my concern or comments is that we talk about the highest court in the land and a court that impacts the every fabric of our society. Yes, it is well known that judges come to a court like that and make a complete metamorphical change and I think that is what those who are advocates at this point and time will suggest. But in so sensitive an area, I

think it behooves anybody that is reviewing someone for a high court to use as precedent or as a basis of review, past record and past history..."

Robert Reed
Athlete
Houston Rockets:

"But as time changed, George Wallace realized,`hey', there is nothing wrong with it, we have to live with it, and I've got to change my ways to conform with what the American public wants, if I want to be in public office. I have yet to hear or to say anything about what I realized I was wrong and I need to change my views and my ways. He's always going around the bush and if I see a man trying to himhaw or go around the bush, to me you have not changed your own ways of thinking."

John Odam
Trial Lawyer:

"Well, everyone is entitled to a change in opinion, he has gone the entire political spectrum back and forth from socialism to communism, libertarian, conservatism. I'm not sure he has completely found it in his own mind a true philosophy."

L. Franco Lee
County Commissioner:

"It is clear the man is a strong ideologue, leaning in the right direction, which will skew the Supreme Court quite a bit and that's critical to our future, for the minorities particularly."

Video tape produced by:
Brian Huberman
Terence O'Rourke
Rice University Media Center
Houston Texas

Citizens for Decency through Law, Inc.

Testimony of

CITIZENS FOR DECENCY THROUGH LAW, INC.
11000 North Scottsdale Road, Suite 210
Scottsdale, Arizona 85254
(602) 483-8787

Before the

Committee of the Judiciary

Of The

United States Senate

In favor of the appointment of

JUDGE ROBERT H. BORK

to the
United States Supreme Court

SUMMARY

Citizens for Decency through Law, Inc. strongly urges the United States Senate to confirm Judge Robert Bork as an Associate Justice of the United States Supreme Court. Judge Bork's lengthy and distinguished legal career provides him with superb qualifications to serve on the Court. His understanding of the role of the judiciary, and his approach to constitutional interpretation are consistent with the separation of powers provided for by the authors of the Constitution. Specifically Judge Bork understands, as does the Supreme Court, that obscene and pornographic material is outside the protection of the first amendment, and can constitutionally be proscribed by communities and states.

INTRODUCTION

Judge Robert Bork has been described by opponents as a "rigid, ideological conservative." He also has been derogatorily characterized as "against abortion," "against pornography" and "against homosexual rights." In fact, Robert Bork may or may not be any or none of these things. Those who accuse him reveal only their own ignorance of the intricacies of constitutional law and judicial philosophy, or worse, their talent for character assassination and outright dishonesty.

Even Judge Bork's enemies acknowledge his brilliant scholastic and jurisprudential record. Justice Stevens, considered a moderate-to-liberal member of the high Court, has taken the rare step of publicly defending Judge Bork. Justice Stevens has praised Bork's qualifications and called him a "welcome addition to the Court." Federal judges surveyed by the L.A. Times would vote to confirm Bork by a better than 2-to-1 margin. Leading law professors--liberal and

conservative--have publicly vouched for Bork's academic credentials and urged his confirmation.

But credentials are no longer the issue. His "ideology"--as his critics so crudely refer to a judicial philosophy developed over four decades of learning--has been made the central issue of the upcoming confirmation hearings. These attacks must be answered by a defense of Judge Bork's principled and reasoned approach to jurisprudence. This memorandum shall do three things:

1) Explain the judicial philosophy of Judge Bork with regard to the constitutional role of the judiciary, and the judge's obligation to interpret the Constitution by discerning the intent of the Framers;

2) Show that Judge Bork's judicial philosophy does not favor the political goals of conservatives or liberals;

3) Show that Judge Bork's judicial philosophy is not only correct, but required by the Constitution.

SEPARATION OF POWERS

Judge Bork's views on the role of the judiciary can be summed up quite easily: "A judge is not a legislator." It seems a simple and obviously true proposition, yet most attacks on Judge Bork focus on his refusal to act like a legislator. But the President cannot make rulings on guilt or innocence - that is for the judiciary. The Congress cannot negotiate treaties - that is for the President. And the judiciary cannot make laws - that is for the Congress. Obviously Judge Bork understands the constitutionally required separation of powers better than his critics. Invariably, their concern is not the Constitution, but the bottom line on particular issues. That is why they rail against Judge

Bork for being "against abortion," even though he has never publicly expressed any view on the wisdom or morality of the practice.

Judge Bork is not, in a legal sense, "against" abortion. In fact, given his self-avowed libertarian leanings, he quite possibly might oppose any restrictions by the state on the practice of abortion, if he were a voting member of Congress. But as a judge, his personal views about abortion are completely irrelevant. When asked to decide whether a state law outlawing abortion violates the Constitution, the question for a judge is not: "Should abortion be illegal?" but "Does the Constitution prevent states from outlawing abortion?" The judge may believe strongly that women should be free to obtain abortions, but unless he finds something in the Constitution that says otherwise, he must let the law stand as constitutional. But the approach taken by a divided Supreme Court, in Bork's words, "confuses the constitutionality of laws with their wisdom."[1] Believing that abortion should be legal, the Court has ruled that the Constitution requires it to be legal.

In his 1971 law review article "Neutral Principles and Some First Amendment Problems," Bork describes the proper role of the judiciary:

> "Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court."[2]

SUBSTANTIVE DUE PROCESS

The theory of substantive due process, culminating in the "right to privacy" line of abortion cases, is a prime example of what ails present methods of constitutional interpretation. At the same time, substantive

due process provides us with historical evidence that judicial activism can be used to either "conservative" or "liberal" political ends.

Substantive due process is the judicially created notion that there inhere within the 14th Amendment due process clause some substantive rights retained by individuals; that the words "...nor shall any State deprive any person of life, liberty or property, without due process of law..." not only guarantee procedural rights, as the language clearly indicates, but also give rise to separate substantive rights. These substantive rights, which cannot be deprived even if due process is given, supposedly arise from an individual's "liberty" interest. But what are these rights? There is no way of telling--until the Supreme Court tells us.

Essentially, substantive due process is a fiction created by the judiciary to strike down legislation with which the judiciary disagrees. Although now used nearly exclusively to "liberal" political ends, the doctrine was originally created in the 1930's by conservative Supreme Court justices who sought to stop President Roosevelt's New Deal legislation. These justices disagreed with Roosevelt's progressive legislation, and created substantive due process as a means to protect free market capitalism.

Faced with President Roosevelt's court-packing scheme, the Supreme Court eventually changed its view of the New Deal legislation. The doctrine of substantive due process fell out of favor, until it was revived in the 1960's in the case of Griswold v. Connecticut.[3] But this time liberal judges were the activists, using the theory of substantive due process to protect non-economic "privacy" interests discovered floating in the "penumbras" of the Bill of Rights. But all that talk

about "penumbras" and "privacy" means only that the Supreme Court didn't like the fact that Connecticut prevented the use of contraceptives, even by married couples. But the Court needed some justification to strike down the law.

Eight years later the Supreme Court informed us that this "zone of privacy" also protected a woman seeking to abort her child.[4] But in 1986 we found out that it doesn't protect homosexual sodomy.[5] As Judge Bork points out in his criticism of Griswold, this kind of judicial creation does not provide any "neutral principles" upon which to base a decision. That leaves only the subjective value preferences of whoever happens to be on the Court. Judge Bork prophetically saw that the lack of guiding principles in Griswold would lead to the confusion of extending the right to one group (women seeking abortions) and not another (homosexuals):

> "Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in Griswold through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming the power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure."[6]

If Judge Bork truly were a "rigid, conservative ideologue," he ertainly would have supported the use of substantive due process to rike down liberal legislation in the 1930's. But Judge Bork has made ear his view that substantive due process is wrong when used to nservative ends, wrong when used to liberal ends. He has been just as itical of the use of substantive due process to protect the free market to create a "right to privacy." He would not be a "conservative tivist" on the Supreme Court.

When the Court acts to strike down majority legislation without explicit authority from the Constitution, all that has happened is that the power to make law has been shifted from elected representatives to five unelected lawyers. Right now liberals are happy with substantive due process, because it has served their political ends. But once upon a time it served the interests of conservatives, and it may do so again. That is why it is in the interest of all to support the confirmation of Judge Bork, who would apply "neutral principles" in a manner that would serve the political interests of neither the left or the right, and return the "imperial judiciary" to its proper role under the Constitution.

INTENT OF THE FRAMERS

Judge Bork's intellectual pursuit of a theory of constitutional interpretation that is "neutrally derived, defined and applied,"[7] led him to what is now called an "original intent" methodology. Essentially, proponents of this methodology assert the seemingly non-controversial view that the Constitution means what its authors intended it to mean.

An example of Judge Bork's method of constitutional interpretation is given in the 1971 "Neutral Principles" article. Specifically, Judge Bork takes the correct view that pornography was never intended to be protected by the first amendment guarantee of free speech. This is the same view taken by the United States Supreme Court in every decision on the subject--that category of material that is legally "obscene" is outside the protection of the first amendment. And this is why Citizens for Decency through Law, Inc. supports the confirmation of Judge Bork. His correct view of the Constitution leads him to the correct legal view on particular issues, including the issue with which CDL is concerned.

Again, Judge Bork recognizes that the question for a judge is not: "Should obscene material be banned?" but "Does the Constitution forbid the banning of obscene material?"

To answer that question, Judge Bork examines the free speech clause of the first amendment in an attempt to discern what the Framers intended it to protect. At the time he wrote the 1971 article, Judge Bork believed the Framers intended the first amendment to protect only explicitly political speech:

> "I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[9]

In contrast to critics' portrayal of Judge Bork as a rigid, inflexible conservative, he has since amended his view, stating that the Framers intended more than explicitly political speech to be protected by the first amendment. Nevertheless, his inquiry remains the correct one: "What did the Framers of the first amendment intend that provision to protect?" rather than "What limitations do we think should be placed on speech?" The latter is a question to be debated by the legislative branch of government. But when judges start talking about the "broad principles" contained in the first amendment, this invariably means they are departing from the intent of its authors, and substituting their ideas of what <u>should</u> be constitutionally protected for what actually <u>is</u> protected. Judge Bork, on the other hand, is committed to the principle that a written Constitution is meaningless if we pay no attention to the intent of the men who wrote it. Without the anchor of "original intent," judges would be free to make their own value preferences a part of

constitutional law, thus essentially usurping the law-making function from the legislative branch. Judge Bork would resist the temptation to impose his will on the country, and would return the judicial branch to its proper role of interpreting, not making law.

FOOTNOTES

[1] R. Bork, "Neutral Principles and Some First Amendment Problems," 47 INDIANA L.J. 1, at 28.

[2] Id., at 21.

[3] 381 U.S. 479 (1965).

[4] Roe v. Wade, 410 U.S. 113 (1973).

[5] Bowers v. Hardwick, 106 S.Ct. 2841 (1986).

[6] Bork, 47 INDIANA L.J. at 9.

[7] Id., at 23.

[8] Id.

[9] Id. at 20.

CITIZENS FOR GOD & COUNTRY

TESTIMONY ON THE NOMINATION OF

JUDGE ROBERT H. BORK FOR THE U. S. SUPREME COURT

P. O. Box 137
McLean,Va. 22101

September 21, 1987

CITIZENS FOR GOD & COUNTRY QUESTION NOMINEE BORK ON THE FOLLOWING CONSTITUTIONAL CONCERNS:

I. Will the Nominee, as a Justice on the U. S. Supreme Court, address the admonishments of Chief Justice Burger, 1984, on "massive corruption of attorneys and judges, threatening the survival of our institutions," endangering national security and individual rights; and the admonishments of Reagan and Shultz, 1984 on the unconstitutional laws imposed upon the courts by anti-American pressures to deny redress of grievance in all branches of government, involving the Great Society Programs, as:

a) Federal Aid to Education, denying local administration, taxpayers and parental sovereignties, to Sovietize the U. S.

b) The Civil Rights Act, Hatch Act, Civil Service Reform Act, all exempting educational systems to propagate the Soviet Constitution.

c) Affirmative Action enforced by officially identified corruption, denying the MERIT SYSTEM, equal protection,[1/] and varied Labor-Management Laws to interfere with Constitutional performance of official duties, destructive of Western civilization.

d) Appellate Power for labor unions, which by Hobbs Act force,crime, and violence, deny free elections to extort unconstitutional laws.

e) Communist Goal, Item 35, by legislative action to "Discredit and dismantle the FBI" subverting law-enforcement for subversion threatening national security.

1/ Equal Protection under the law for non-minority.

II. Will the Nominee address Judicial manipulations - frauds - submitting to anti-Constitutional "aid and comfort to the enemy," boasting of control over judges and other officials by subtle bribes and blackmail to deny full discovery to misrepresent the Establishment Clause - CHRISTIAN LAW PRIORITY, CHRISTIAN NEUTRALITY - as in the Tennesee-Alabama textbook cases, family-morality cases, and the Appeals Court, 1987_ Chicago Nativity case, Appeals Court Judges Wood, Flaum, Easterbrook, 1987 overruling Judge McGarr, who denied Plaintiff status and declared THIS IS A CHRISTIAN NATION, 1986?

III. Will the Nominee address corruption by questionable tax-exempt funds to finance political campaigns in all levels of government, to extort in return unconstitutional laws imposed in court cases to advance the communist goals, and the Soviet Constitution, Art. 1, 25, 52, 169, Annex A... "centralized education, separation of church and state, propagate worldwide atheism, communistic morality, socialization, classless society, workers of all countries, unite." -- labor union devastations by deficit spending?

IV. Will the Nominee distinguish between the U. S. A. Constitution, CHRISTIAN NEUTRALITY TO SECURE ALL ORDERLY INDIVIDUAL, INHERENT RIGHTS, and the U. S. S. R. Constitution, international militant atheism, which refuses to acknowledge that all political, social, economic, moral problems find their ultimate solutions by DIVINE LAW for stability of Justice?

V. Will the Nominee address the religious complexity of this Christian nation -- -95% Christian, 2.5% Jews, 1% Islams, stressing that no free nation survives exploiting the taxes of the majority to propagate the culture of the anti-American minority by their MELTING POT amalgamations of color, race, religion, abortions, homos, obscenity, but by nurtured public conscience by authority higher than man for self-discipline for self-government?

VI. Will the Nominee respond to the vehement demands for Christian ethics by Pro-American Jews, Islams, as Christians, acknowledging that ONLY IN A CHRISTIAN NATION DO CHRISTIANS HAVE CIVIL RIGHTS? ONLY IN A CHRISTIAN NATION DO COMPATIBLE NON-CHRISTIANS, AWAY FROM THEIR LAND OF ORIGIN, HAVE CIVIL RIGHTS, AND FAR MORE THAN IN THEIR HOMELAND AS A MAJORITY? DENY CHRISTIAN ETHICS IN GOVERNMENT, AND NONE SHALL KNOW FREEDOM, FOR DENIAL OF THE HRISTIAN COMMON CULTURE, CHRISTIAN COMMON LAW , INVITES TOTALITARIANISM ESTRUCTION OF CIVIL RIGHTS AND SURVIVAL OF WESTERN CIVILIZATION, THE RY FOUNDING PURPOSE OF THIS CHRISTIAN NATION.

II. Will the Nominee reassert the propoundings of the U. S. Supreme Court emming from Holy Trinity, 1892 legislated as THE YEAR OF THE BIBLE, PL 97-280, 1982

"We are founded to legislate, propagate, and secure general Christian ith...the common law...Nothing be done to hurt Christianity...Bring fidels and savages unto human civility for a quiet and settled government... e morality of the nation is deeply engrafted upon Christian faith...Enter co confederations to preserve and maintain the True Gospel of the Lord sus...This is a Christian nation" entitled to Christian administration?

Y AS ONE NATION UNDER GOD CAN GOD-GIVEN, INALIENABLE RIGHTS FOR LIBERTY LIFE FOR SELF AND POSTERITY FOR ALL ORDERLY CITIZENS BE GUARANTEED BY CONSTITUTION OF THE UNITED STATES OF AMERICA.

e civil rights depend on Constitutional guarantees, when will Senate cial nominations be confined to the founding Christian principles?

x x x

ONE NATION UNDER GOD
Title 36, U. S. C. 172
Bethesda, Md.

Defenders of Christian Ethics In Government

CHICAGO NATIVITY DECISION -- SOVIET CONSTITUTION

Who Is Influencing Our Judges

The American Jewish Congress, Anti-Defamation League, B'Nai Brith, Americans for Religious Liberty, ACLU, National Council of Churches, challenged the Chicago Nativity, U. S. Court of Appeals, 1987, as violating the Establishment Clause of the First Amendment.

The Plaintiffs charged the Nativity was ISOLATED, too far away from the other Christmas decorations THUS EMPHASIZING "promotion of religion!"

The majority Judges, Wood and Flaum for the first time in decades cited the true meaning of the Establishment Clause, First Amendment -- CHRISTIAN LAW PRIORITY, CHRISTIAN NEUTRALITY. By the mere "sleight-of-the-hand" they abandoned the U. S. Constitution for the manipulative three-prong test, a "gimmick" to sever the Judiciary from the Constitution Christian ethics, as done in the Executive Branch by the deceptive Great Society Programs and the Civil Rights Act to amalgamate colors, races, and religions into the Soviet MELTING POT. Thus, Wood and Flaum "decided" the Nativity promoted religion even though no Christian church sponsored the Nativity, government did not favor or disfavor a Christian church, no intimate, daily, audits are involved to prevent promotion of one Christian sect over another, and the Nativity is a symbol of the founding Christian principles which structure the U. S. Constitution, which guarantees INDIVIDUAL RIGHTS for orderly non-Christians. Pro-American Jews and Islams demand vehemently the shelter of Christian ethics against the threatening repeat world history, which holocausts believers by controlling public officials by bribes and black-mail: They protest official patronage to unregistered alien enemy agents:

The Appeals Court gave heavy sympathy to Sol Brandzel, AJC, "...I am an outsider in the political community who is merely tolerated..." citing Justice O'Connor who makes frequent anti-American dicta, endangering Constitutional safeguards! These disloyalties overlook that Sol ungratefully ignores the Hannuka, not a religious but patriotic-historic holiday, dates shifted to compete with Christmas, only in Christian nations: billions of grants to Israel: billions more to anti-Christians to propagate enemy doctrines, with profits for luxury limousines: and the BONANZA PROFITS at Christmas time by Jewish merchants -- OUTSIDE THE POLITICAL SYSTEM?

While Judge Easterbrook favored ALL Christmas symbols, he misrepresented the Supreme Court favorable guides on school prayers opposing them unconstitutionally! How does a free nation survive abandoning propagation of its founding culture, in the U. S. 95% Christian, 2.5% Jews, 1% Islams, all guaranteed rights to build their estates, synagogues-temples, free press...

OBVIOUSLY, THE DISCOMFORT OF SOL IS A FRAUD, SINCE ONLY BY THE CHRISTIAN ETHICS, THE SYMBOL OF THE NATIVITY IS THE CONSTITUTIONAL GUARANTEE FOR HIS CIVIL RIGHTS, FAR MORE THAN AS A MAJORITY IN HIS FATHERLAND? Apparently, the Judges granted Plaintiffs status by the U. S. Constitution, and decided by the U. S. S. R. Constitution -- SEPARATION OF CHURCH AND STATE, WORLDWIDE ATHEISM.

COMMUNIST AIMS SOLD TO AMERICANS BIT-BY-BIT!

The following list of 45 current Communist goals appeared in *The Congressional Record* January 10, 1963. They were taken from *The Naked Communist* by Cleon Skousen, who began his intensive study of the Communist Conspiracy during his 16-year term of service with the FBI.

The list confirms the "line" pursued in Communist publications in this country such as *The Worker, The People's World*, and a number of front publications.

Actively aided and abetted by such organizations as the National Council of Churches, The National Education Association, The American Civil Liberties Union, the Rockefeller controlled Council on Foreign Relations (*The Invisible Government in America*), The Rockefeller Foundation, The Ford Foundation, and others, the international Communist Conspiracy has managed to achieve many of these goals while you and I were asleep, dreaming *it can't happen here!* Well, IT IS HAPPENING HERE AND IT IS HAPPENING NOW right under your very nose. IT IS TIME TO WAKE UP AMERICANS!

CURRENT COMMUNIST GOALS

1. U.S. acceptance of coexistence as the only alternative to nuclear war.

2. U.S. willingness to capitulate in preference to engaging in atomic war.

3. Develop the illusion that total disarmament by the United States would be a demonstration of moral strength.

4. Permit free trade between all nations regardless of Communist affiliation and regardless of whether or not items could be used for war.

5. Extension of long-term loans to Russia and Soviet satellites.

6. Provide American aid to all nations regardless of Communist domination.

7. Grant recognition of Red China. Admission of Red China to the U.N.

8. Set up East and West Germany as separate states in spite of Khrushchev's promise in 1955 to settle the German question by free elections under the supervision of the U.N.

9. Prolong the conferences to ban atomic tests because the United States has agreed to suspend tests as long as negotiations are in progress.

10. Allow all Soviet satellites individual representation in the U.N.

11. Promote the U.N. as the only hope for mankind. If its charter is rewritten, demand that it be set up as a one-world government with its own independent armed forces. (Some Communist leaders believe the world can be taken over as easily by the U.N. as by Moscow. Sometimes these two centers compete with each other as they are now doing in the Congo.)

12. Resist any attempt to outlaw the Communist Party.

13. Do away with all loyalty oaths.

14. Continue giving Russia access to the U.S. Patent Office.

15. Capture one or both of the political parties in the United States.

16. Use technical decisions of the courts to weaken basic American institutions by claiming their activities violate civil rights.

17. Get control of the schools. Use them as transmission belts for socialism and current Communist propaganda. Soften the curriculum. Get control of teacher's associations. Put the party line in textbooks.

18. Gain control of all student newspapers.

19. Use student riots to foment public protests against programs or organizations which are under Communist attack.

20. Infiltrate the press. Get control of book-review assignments, editorial writing, policy-making positions.

21. Gain control of key positions in radio, TV, and motion pictures.

22. Continue discrediting American culture by degrading all forms of artistic expression. An American Communist cell was told to "eliminate all good sculpture from parks and buildings, substitute shapeless, awkward and meaningless forms."

23. Control art critics and directors of art museums. "Our plan is to promote ugliness, repulsive, meaningless art."

24. Eliminate all laws governing obscenity by calling them "censorship" and a violation of free speech and free press.

25. Break down cultural standards of morality by promoting pornography and obscenity in books, magazines, motion pictures, radio and TV.

26. Present homosexuality, degeneracy and promiscuity as "normal, natural, healthy."

27. Infiltrate the churches and replace revealed religion with "social" religion. Discredit the Bible and emphasize the need for intellectual maturity which does not need a "religious crutch."

28. Eliminate prayer or any phase of religious expression in the schools on the ground that it violates the principle of "separation of church and state."

29. Discredit the American Constitution by calling it inadequate, old-fashioned, out-of-step with modern needs, a hindrance to cooperation between nations on a worldwide basis.

30. Discredit the American Founding Fathers. Present them as selfish aristocrats who had no concern for the "common man."

31. Belittle all forms of American culture and discourage the teaching of American history on the ground that it was only a minor part of the "big picture." Give more emphasis to Russian history since the Communist took over.

32. Support any socialist movement to give centralized control over any part of the culture, education, social agencies, welfare programs, mental health clinics, etc.

33. Eliminate all laws or procedures which interfere with the operation of the Communist apparatus.

34. Eliminate the House Committee on Un-American Activities.

35. Discredit and eventually dismantle the FBI.

36. Infiltrate and gain control of more unions.

37. Infiltrate and gain control of big business.

38. Transfer some of the powers of arrest from the police to social agencies. Treat all behavioral problems as psychiatric disorders which no one but psychiatrists can understand or treat.

39. Dominate the psychiatric profession and use mental health laws as a means of gaining coercive control over those who oppose Communist goals.

40. Discredit the family as an institution. Encourage promiscuity and easy divorce.

41. Emphasize the need to raise children away from the negative influence of parents. Attribute prejudices, mental blocks and retarding of children to suppressive influence of parents.

42. Create the impression that violence and insurrection are legitimate aspects of the American tradition; that students and special-interest groups should rise up and use united force to solve economic, political and social problems.

43. Overthrow all colonial governments before native populations are ready for self-government.

44. Internationalize the Panama Canal.

45. Repeal the Connally Reservation so the United States cannot prevent the World Court from seizing jurisdiction over nations and individuals alike.

Additional copies of this tract available at the following prices:
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WASHINGTON OBSERVER
P.O. Box 1306, Torrence CA 90505

The NEA is an association of teachers whose salaries are paid by taxes levied on working Americans. Its leaders have declared that they intend to control the direction of education. Executive secretary of NEA, Terry Herndon, has openly declared the intention of NEA to destroy traditional Western values, saying: "In most places, the traditional values have included . . . Protestantism and things like that . . . I think a good school system will expose children to traditional and alternative values and let the children decide."

The NEA's "alternative values" referred to by Herndon include the nihilistic and perverted rantings of savants such as Solomon Gordon and other authors of the depraved filth now flooding the schools at taxpayers' expense.

1970's

THE UNION LEADER
Manchester, N.H. Saturday, August 15, 1981

"I Was Dumb"

Addressed to William Loeb: New York Mayor Ed Koch, former senator who blazed the trail for the "Great Society" programs, and the Civil Rights Act which gave it status declares that he voted for nearly every social and welfare proposal offered as a senator in U.S. Congress.

Now, having watched these programs up close under his administration as Mayor of New York City, Koch admits his serious errors.

"I was dumb. We all were dumb. I voted for so much crap! Who knew? We got carried away with what the sociologists were telling us . . . We had a small number of people whom we permitted to dominate society.

This was their view: it never was the view of the majority."

Considering all the damage which Koch did to our nation by supporting such programs, we hope he lives a long time to deal with his own cause of his prevailing problems. He should have fulfilled his oath to defend U.S. Constitution, which he still is not doing. Instead he supported subversion against U.S. Constitution. Christian law priority. Every aspect of the "Great Society" programs is from some mandate of the U.S.S.R. Constitution for the ultimate "classless society." Annex A. Yet, the "Dumb-dumbs," among them Kennedy and Cranston and others keep pushing for Great Society, which is sad destruction of all liberties including diversity. Every advocate in Congress who supports Great Society subversion should be held accountable for violation of the U.S. Code of ethics, priority of Christian law.

CITIZENS FOR GOD & COUNTRY

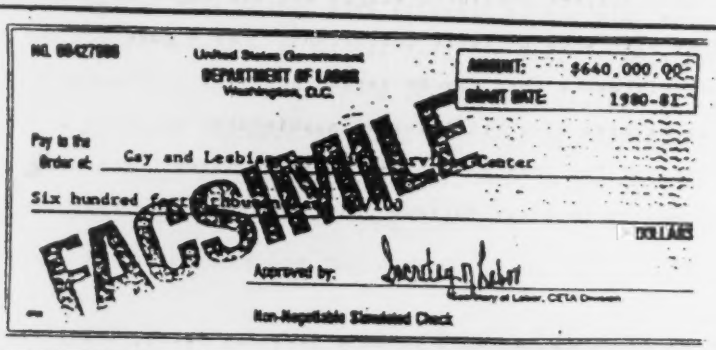
P. O. Box 137
McLean, Va. 22101

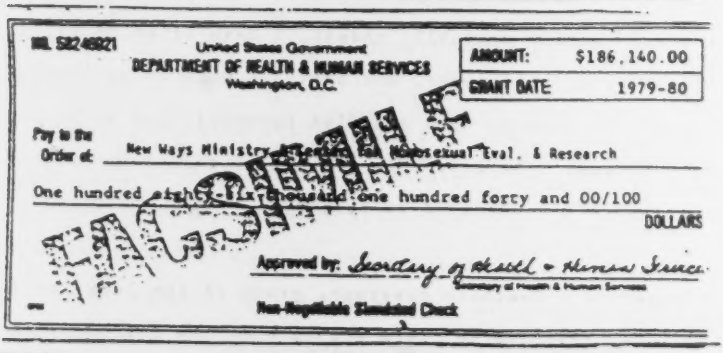
Best congress money can buy

By ANNE NEAMON

MC LEAN, VA — Ridiculed internationally as the BEST CONGRESS THAT MONEY CAN BUY, by public deceptions, Congressmen legislated pay-offs for political debts and lifetime tenure. Abandoning duty and honor to the Oath and Constitution, religious commitments, Congressmen budgeted advocacy for the Soviet Constitution — international militant atheism by separation of church and state. Its massive corruption seeped into the Executive and Judicial Branches. By denial of the Bill of Rights, particularly the redress of grievance, Congress reduced the national budget to a national crisis, endangering all liberties and national sovereignty by TAXATION WITHOUT REPRESENTATION.

Aside from the examples below, there are more current grants under "nice-sounding" social programs. Not only Christians, but Pro-American Jews and Islams protest this Congressional disorder omitting Divine Law for stability of moral order, justice and human dignity.




United States Government
DEPARTMENT OF HEALTH & HUMAN SERVICES
Washington, D.C.
AMOUNT: $186,140.00
GRANT DATE: 1979-80
Pay to the Order of: New Ways Ministry
Homosexual Eval. & Research
One hundred eighty-six thousand one hundred forty and 00/100
DOLLARS
Approved by: Secretary of Health & Human Services
Non-Negotiable Standard Check
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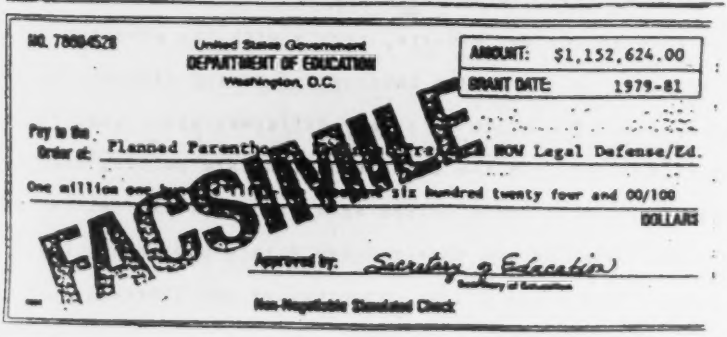

STATEMENT OF GOVERNOR BILL CLINTON
ON THE NOMINATION OF JUDGE ROBERT BORK

I appreciate the opportunity to express my views on Judge Bork's nomination to the Supreme Court, although I do so with reluctance. Judge Bork taught me constitutional law at Yale Law School. He was a good, articulate, aggressive teacher. He pushed his views but invited honest debate. I respect his intelligence, the many years he has given to developing and articulating his views, and the candor and conviction with which he has done so.

I also respect President Reagan and his right to nominate a Justice with whom he feels comfortable. As a governor who makes appointments that may be second-guessed, I understand well the hazards of criticizing an appointment based on a prediction of how that person will perform later. Some of those predictions about Supreme Court nominees have been wrong in the past.

Finally, I do not wish to be a divisive force, refighting old battles. During my public career, I have tried to bridge the gaps of race, philosophy, and party to work on an agenda of unity that will take us into the 21st Century. But it is precisely because I believe this nomination threatens further division that I have decided to testify.

I speak as a Southern governor, proud of the long, hard road we have travelled in civil rights over the last 30 years, partly through our own efforts, partly with the prodding of the Supreme Court in areas like housing and voting rights as well as education. The South is a very different place than it was a generation ago. In the South today, we are pulling together. We should not risk being pulled apart to fight old battles in new forms. That is the threat Judge Bork's nomination poses to our people, white and black, conservative and liberal, Republican and Democrat.

The threat grows out of Judge Bork's constitutional theories of individual and civil rights, and his judicial activism as expressed in speeches, articles, and decisions made since he became a judge, as well as statements made before then.

Throughout his career, Judge Bork has criticized almost every major civil and individual rights case except Brown v. Board of Education. If the Constitution no longer reaches the areas Judge Bork disdains, reactionary forces in our states will be tempted to try again to reopen old wounds. While most of our people will reject such efforts, others will want to see if Judge Bork means what he has said and will be encouraged to take their fight all the way to the Supreme Court. We cannot afford to spend the next 25 years fighting the battles of the last 25. Judge Bork's constitutional theory and his often-stated conviction that new Supreme Court justices have an obligation to reverse old "errors" makes this prospect very real.

Since my graduation from Yale Law School, I have taught constitutional and antitrust law at the University of Arkansas Law School, served as attorney general and governor of my state. Throughout these years, I have followed Judge Bork's career and the expression of his views. In recent weeks, I have reviewed again many of his statements, as well as the White House defense of Judge Bork as a mainstream traditional proponent of judicial restraint. I have watched almost all of Judge Bork's testimony. I do not believe a fair and full reading of Judge Bork's writings, and speeches will support the conclusion that he is simply another mainstream, conservative judge.

Judge Bork has perhaps the most restrictive view of what the Supreme Court can do to protect individual rights of anyone who has been nominated to the Court in decades. Most people who support Judge Bork do so because he has attacked unpopular

decisions in this area -- on abortion, school prayer, and criminal procedures. But Judge Bork has not just said these cases were wrong. He has said all the cases protecting privacy rights from government interference, and many protecting religious practices, were wrongly decided.

On abortion Judge Bork testified that one could make a strong moral argument for abortion as well as against. He simply believes the Constitution cannot protect minority privacy rights of this or virtually any other kind from majority will.

In 1920, the Supreme Court said the State of Oregon couldn't make all its children go to public as opposed to church schools. In 1922, the Court said Nebraska couldn't stop a Lutheran school from teaching its children in German as well as English even though state law forbade it. In 1972, the Court held that Wisconsin had to respect the Amish people's convictions about how long their children should go to school. Judge Bork thinks all these cases were wrongly decided.

Judge Bork's constitutional views are more alarming because of his clearly stated views on the Supreme Court's responsibility to overturn past "errors" and because of his demonstrated judicial activism in support of his political and economic theories.

In 1982, Judge Bork said that a large portion of the constituional decisions of the last three decades were wrong and should be overturned. He has attacked conservative and liberal judges alike when they upheld individual liberties against government intrusion. In 1985, when asked if he could say which decisions should be overturned, he said, "I can, but I won't."

As late as January of this year, Judge Bork said "an originalist judge" should have no problem in overturning an illegitimate precedent, although not if the effect were "to uproot our entire government and society." At that time, he cited only the commerce clause cases as an example of such a settled area of law. In his testimony before this Committee, he has added some equal protection and First Amendment cases to his "don't overturn" list. That leaves many other landmark cases on his list of "dozens" which need to be reversed.

Most Supreme Court justices have tried hard to follow previous Supreme Court decisions, while recognizing that on occasion it is essential to reverse past decisions. Until his confirmation hearings, Judge Bork's attitude seems to have been the reverse, i.e., that wrong decisions should be overthrown whenever possible, although on occasion it is essential to let them stand, because of the networks of dependency and expectation which have grown up around them.

Judge Bork sought in the confirmation hearings to bridge the gap between his view and the more traditional one by adding some First Amendment and equal protection cases to his "don't overturn" list and by repeatedly reaffirming his respect for following precedents, the principle of stare decisis.

However, even if he accepts his inability to reverse all the cases he has attacked, Judge Bork will surely do what he can to give those cases the narrowest possible reach. That may be the most important aspect of his view of the constitutional rights cases, because the Court will more likely face cases not exactly like previous ones, but similar enough to raise the question of whether the constitutional protection in question should be extended. I think Judge Bork has told us how he will rule in these cases.

Judge Bork has urged us not to worry too much about his views because he says he believes in judicial restraint, in the

Court respecting every action of the legislative and executive branches of government unless the Constitution clearly forbids it. That is what he says he meant, for example, when he compared a married couple's private decision to use contraceptives with a utility's desire to pollute the air and stated that, under the Constitution, one is no more deserving of protection than the other. He has made similar searing attacks on actual cases which are an important and widely accepted part of our way of life.

However, Judge Bork's attacks on dozens of cases securing individual rights against government abuse cannot be explained wholly in terms of his belief in deference to majority rule. The fact is that his commitment to restraint is highly selective. He has repeatedly attacked and, as a judge, overruled legislative or executive decisions apparently because he simply disagreed with them.

While Judge Bork often defers to government when it restricts liberties, he has brushed aside both law and executive regulation when necessary to further his economic theories.

In that context, I want to mention two of Judge Bork's utility decisions. Neither is an example of judicial restraint. In fact, a distinguished University of Chicago law professor, Richard Epstein, writing in The New York Times last month in support of this nomination, cited one of them, the Jersey Central Power and Light case, as evidence that Judge Bork is not bound by the doctrine of judicial restraint when the cause is right. The cause in this instance was sufficient profits for a utility holding company.

The Jersey Central case involved the Federal Energy Regulatory Commission's policy, adopted in 1979, to allow utilities which cancel nuclear plants to recover those investments from customers. Even this is controversial with

states, which would like to have the power to review the prudence of such expenditures before charging ratepayers for them. But Judge Bork went even beyond the present rule.

In Jersey Central, Judge Bork wrote an opinion which set aside an FERC order upholding its standard policy and directed the Commission to give the utility a hearing on whether it could charge the ratepayers enough, not only to cover the cost of the cancelled plant, but also to earn a profit on it.

Judge Bork created what, in my view, is a new right under the Fifth Amendment: the right of a utility to earn a profit on an investment that turned out to be unwise and useless to ratepayers, if the utility could prove it needed the money and the new rates would not be higher than those of surrounding utilities.

The Jersey Central case could be of great importance to the people of our state because Arkansas is one of four states tied to Middle South Utilities which has an unfinished nuclear plant, Grand Gulf II. The other states in MSU are Mississippi, Louisiana, and Missouri. I do not believe many of America's poorest ratepayers should be constitutionally obliged to provide a profit on an unused nuclear plant.

Judge Bork issued an interesting opinion in another utility case involving his court's review of the Federal Energy Regulatory Commission's allocation of power from Middle South Utilities' Grand Gulf I plant. In that case, FERC had already assigned Arkansas ratepayers 36 per cent of the cost even though a previous agreement with the Middle South system allocated more of Grand Gulf to Arkansas. Judge Bork wrote an opinion ordering FERC to review its decision and advocating another allocation system that would give our people much higher rates than those in other Middle South states, rates so exploitative they would be ruinous to our people. A parochial

problem of our state cannot decide this appointment, but our case is a remarkable example of the Judge's lack of judicial restraint.

In addition to his activism for utilities, Judge Bork is also an antitrust activist who has openly asserted the obligation of the courts to undermine congressional intent as expressed in the antitrust laws. Judge Bork has said that the Court should not enforce many antitrust laws because he believes there is nothing wrong with most mergers and other anticompetitive practices even if they are now illegal. One thing he wants to legalize is a manufacturer's ability to fix the price at which a retailer can sell products to consumers. A case on this issue is before the Supreme Court right now. If the decades old ban on manufacturers' price fixing is dropped, it would have very bad consequences for discount stores like Wal-Mart, headquartered in Arkansas, and for small business as well. And consumer prices would rise.

Judge Bork has spent his adult lifetime defining and refining theories which he can put into practice only by radical activism in overturning decades of protections for citizens against government, and decades of restraint by government on large concentrations of economic power.

If Judge Bork were to follow his clearly enunciated views on the high Court, the stability and progress of my state and

region could be threatened. The risk is not worth taking. The changes in the South have taken a lot of energy, but we have emerged as a vibrant, dynamic part of America. Once we stopped focusing on race, we began focusing on growth and jobs and education. We should not risk new conflicts over old issues, and that is the risk this appointment poses.

The choice before you is not whether or not to defeat the President. It is not whether or not to reject Judge Bork on the basis of his character and knowledge. It is not whether or not to block the appointment of a conservative judge.

Like most Southerners, and most Americans, I support basic traditional values. Like most Southerners and most Americans, I don't always agree with the Supreme Court and lower federal courts. Finally, I know the Supreme Court has to reassess its positions from time to time in order to fulfill its historic mission and permit our country to endure for another 200 years. That is why Supreme Court appointments are so important. They keep our Constitution and its guarantees of liberty alive.

Therefore, I hope you will give the President a chance to nominate another justice whose views are more consistent with traditional conservative philosophy and judicial restraint. I say that with regret because of Judge Bork's intellect and lifetime of achievement. I simply believe that the risk that he will do what he has said should be done is too great.

STATEMENT

OF THE

HONORABLE CARDISS COLLINS

ON

THE NOMINATION OF ROBERT BORK

TO THE UNITED STATES SUPREME COURT

Mr. Chairman:

I want to commend you for holding these balanced hearings on the nomination of Judge Robert Bork to the United States Supreme Court. For the reasons I describe below, I urge the committee to recommend the Senate reject his appointment to the Court.

Over the past several years, the "scales of justice" have been tipped delicately on the Supreme Court with no one judicial viewpoint, liberal or conservative, dominating the other.

Clearly, however, if Judge Bork is confirmed, the scales will be tipped decidedly in favor of a rigid, conservative perspective. This is wrong!

Some people, particularly those in the Reagan Administration, argue that ideology should not be a factor in deciding the merits of whether a person should serve on the Court. Instead, they suggest the focus should be on Judge Bork's reputation as a well-respected judical scholar. The Administration also has attempted to cast a new portrait of Judge Bork as a moderate judge.

In my view, these arguments are specious for several

reasons. First, it ignores the Senate's "advice and consent" role in the nomination process. It is entirely legitimate for Senators to consider ideology and judicial perspective in evaluating the merits of a nominee. Second, the mere fact that someone is a judicial scholar is not sufficient to qualify them to serve on the nation's highest court. Finally, it is outright deception to suggest Judge Bork is a moderate.

On the contrary, Judge Bork's writings and public statements reveal a man who is committed to protecting the interests of the government and business against those of individual citizens.

A justice must have compassion for all people. Judge Bork's writings show no sensitivity toward any disadvantaged group. Twenty-five years ago, Bork opposed civil rights legislation requiring hotel and restaurant owners to serve blacks because it would trample "the freedom of the individual to choose with whom he will deal."

A justice must demonstrate an ability to listen to all points of view. Judge Bork's record on the appeals courts fails to demonstrate a balancing of competing viewpoints. According to Public Citizen, in seven split decisions involving a public interest group's challenge to a government regulation, Judge Bork favored the executive branch every time.

A justice must see the Constitution as a document which adapts to the changing circumstances of American society. Judge Bork's statements indicate he sees the Constitution as a rigid, static document which has not changed in two hundred years. Over

twenty years ago, for example, the Supreme Court held there was a constitutionally protected right of privacy. In law review articles and judicial opinions, however, Judge Bork has consistently challenged or tried to restrict this fundamental right.

As a woman and as a black, I am afraid he sees the Constitution of 1987 as the one of 1787. In that world, women had no legal standing. Worse, blacks were counted as only three-fifths of a human being.

If Judge Bork is seated, this myopic viewpoint could drastically shift the delicate balance which currently exists on the Court.

On a 5 to 4 vote this year, the Court upheld a temporary racial quota plan for Alabama state troopers. On a 5 to 4 vote this year, the Court affirmed the First Amendment rights of a woman to make a disparaging remark about the President. And on a "soft" 6 to 3 vote, the Court approved an affirmative action program which recognized women had been the victims of past discrimination.

Next year, the Court will decide the validity of a woman's right to an abortion, the employment rights of gays, and a reverse discrimination case. If Judge Bork is confirmed, we already know the outcome of these cases.

It is a travesty of justice for any person to be seated on the Supreme Court who comes to the bench with such defined and preconcieved notions of justice. The next member of the Supreme

Court must be a person of independence, impartiality, and integrity.

Judge Bork, however, does not meet these standards. Recently, a judicial colleague accused Bork of trying to substitute his minority viewpoint for the majority opinion in a case involving a House Republican challenge to the committee assignment process. As this judge said, this raises a serious question of Bork's "basic honesty."

For these reasons, I support the views of my colleagues in the Congressional Black Caucus on the nomination of Judge Robert Bork to the Supreme Court, and I urge you and your colleagues to reject this nomination.

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

November 2, 1987

TO THE HONORABLE MEMBERS OF THE U.S. SENATE:

The enclosed document is designed to complete the record of the debate on the nomination of Judge Robert H. Bork. It speaks for itself, comprising (1) 10 short "white papers" on all of the primary and secondary issues listed in the Table of Contents of the Majority Report of the Senate Judiciary Committee; (2) examples of the multi-million dollar advertising campaign waged against Judge Bork and a transcript of the principal television advertisement (the Gregory Peck "spot") that was aired nationally and regionally before the commencement of the Committee hearings; and (3) other relevant materials, including the Majority and Minority Reports of the Senate Judiciary Committee.

Attached to this letter, as an introduction to this collection of formal materials, are two newspaper interviews -- the first with Senator Kennedy, which appeared in the Boston Globe on October 11, 1987, and the second with Senator Biden, Chairman of the Senate Judiciary Committee, which appeared in the Washington Post on July 16, 1987. Together, the two describe in explicit terms the strategy behind the private campaign led by Senators Kennedy, Biden, Metzenbaum, and Cranston to defeat the nomination of Judge Bork.

The campaign, debate and vote are finished, but the historical judgment on this important constitutional case remains to be written. We hope these documents will make a contribution to that judgment.

Respectfully submitted,

COMMITTEE FOR A FAIR
CONFIRMATION PROCESS

Of Counsel,

Griffin Bell
Carla Hills
Michael Armstrong
Leonard Garment

BOSTON GLOBE
October 11, 1987
By Ethan Bronner, Globe Staff

KENNEDY TELLS HOW HE ROUSED OPPOSITION

Forty-five minutes after President Reagan nominated Judge Robert H. Bork to the Supreme Court on July 1, Sen. Edward M. Kennedy was on the floor of the Senate, framing the opposition to confirmation in the starkest of terms.

A startled Bork, relaxing in a West Wing office, watched on the C-Span cable network as Kennedy declared that Bork's America "is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids...."

Kennedy's statement, as well as his comments during the hearings, have been the object of unabated derision, referred to repeatedly in attacks on how the nomination has been scuttled through a shameful distortion of Bork's record.

But unless the White House pulls off a miracle before the full Senate votes, this battle can clearly be labeled a Kennedy victory.

Through his statements, through hundreds of telephone calls over the summer and through the drawing power of his name, Kennedy served as a prime mover in bringing the Bork nomination to its knees.

If Sen. Arlen Specter (R-Pa.) played the role of high-minded analyst in Bork's committee defeat, Kennedy served as the rough-and-tumble politician and troop-rouser.

He has been criticized severely for it, but he makes no apology.

"I wanted to make clear what was at stake in this nomination," said Kennedy, thinking back over the past few months as he sat in his Capitol Hill office Friday.

"The statement had to be stark and direct so as to sound the alarm and hold people in their places until we could get material together," he said. "I was confident we could win this one."

The story of Kennedy's success -- one shared by liberal lobbying groups and by Sen. Joseph R. Biden Jr. (D-Del.), the committee chairman -- begins the day Associate Justice Lewis F. Powell Jr. announced his retirement from the high court.

Kennedy knew that Bork was the likely replacement. His staff gathered a number of Bork's now well-thumbed writings, including his 1971 Indiana Law Journal article and his 1963 piece in The New Republic attacking portions of the proposed Civil Rights Act.

Over that weekend, the anti-Bork statement was written. Although its most alarming lines are usually cited, it is instructive to look at other parts of it to see how the arguments Kennedy made against Bork at the time served opponents during the effort to defeat his nomination.

He discussed the Watergate scandal and called Bork "outside the mainstream of American constitutional jurisprudence in the 1960s, let alone the 1980s."

He highlighted Bork's modifications over the years and pointed to the theme of confirmation conversion, saying that the changes resulted from the "twin pressures of academic rejection and the prospect of Senate rejection."

"America is a better and freer nation than Robert Bork thinks," Kennedy added. He insisted that although Reagan is president, he should not be allowed "to impose his reactionary vision of the Constitution on the Supreme Court and the next generation of Americans."

Kennedy said he considered delivering the speech the day before Bork was named in the hopes of deflecting the nomination, but that he ultimately decided that such a strategy would be ineffective.

He said he met with Biden, who had not yet made up his mind on the nomination. Within a week, and following a meeting with civil rights groups, Biden was aboard.

Kennedy had led the unsuccessful fight against elevating William H. Rehnquist from associate justice to chief justice a year ago. He garnered 33 votes in that one and said that with that base as well as with more votes from a newly controlled Democratic Senate, he felt victory was within reach.

On July 8, Kennedy met with Biden and Sens. Howard M. Metzenbaum (D-Ohio) and Alan Cranston (D-Calif.) to work on strategy.

The first point was to gain time to organize against the nomination, and so a decision was reached that there be no hearings until after the August recess.

The next point was to insist on the Senate's coequal role in the nomination process. Kennedy said he had long felt that the Senate should take this role more seriously but that because this nomination seemed so likely to shift the court's balance, many others began to accept it.

Biden made a crucial statement on the Senate floor about the Senate's role, and opinion polls showed that the public was very receptive to the examination of a nominee's philosophy.

The group examined a list of several dozen undecided senators and divided them based on who knew whom best. Kennedy's staff put together an inch-thick binder of Bork's provocative writings and handed one out to about 10 senators to read over the recess. In August, Kennedy hired Anthony Podesta, the founding president of People for the American Way and a liberal lobbyist, to work on organizing opposition.

Podesta recalls going up to the Kennedy summer home in Hyannisport and watching the senator call around the South -- Ernest Morial, the former New Orleans mayor, and the city's current mayor, Sidney Barthelemy. In Alabama, he reached Mayor Richard Arrington of Birmingham, Mayor Johnny Ford of Tuskegee and Joseph Reed, the Alabama Democratic Conference chief.

At one point, Kennedy woke up Rev. Joseph Lowery at the Hyatt Hotel in New Orleans before the Southern Christian Leadership Conference's annual convention.

After talking with Kennedy, Lowery turned the entire day's meeting into an anti-Bork strategy session. From that meeting, the issue made its way into black churches throughout America.

"It has a special effect when Kennedy calls," reflected Jeffrey Blattner, one of Kennedy's judiciary committee aides and a key player in the anti-Bork fight. "A lot of people in this country think of Kennedy as the leading spokesman for civil rights, and when he calls personally it sends a pretty strong message about how important something is."

It was Kennedy who signed up Mayor Andrew Young of Atlanta, one of the hearing's most effective witnesses. He also called former Rep. Barbara Jordan (D-Texas), who at first hesitated for health reasons and then agreed to testify.

From Cape Cod, Kennedy, chairman of the Senate Labor Committee, called every one of the 30 executive members of the AFL-CIO and, in September, held a conference call with 40 state labor

leaders around the country in which he spoke about Bork's record on organized labor.

He called the former American Bar Association president, Robert Meserve, the former secretary of health and human services, Joseph Califano, and a host of prominent lawyers who subsequently became active in the fight through op-ed pieces, testimony and local organizing.

Finally, Kennedy gathered some noted liberal legal scholars, including Laurence Tribe, Philip Kurland and Kathleen Sullivan, all of Harvard University, to build a substantive case against Bork.

He delivered the culmination of their efforts in a widely quoted speech Sept. 11 at Georgetown University Law School.

What Kennedy was most worried about was the testimony of Bork himself. He was known to be witty, charming and penetratingly intelligent, and he had been coached carefully by White House lobbyists. But Bork, Kennedy feels, was unsuccessful.

"It was increasingly apparent after the first hour or two of his testimony that he was not going to pull this off," Kennedy said of Bork's testimony.

In fact, while Kennedy questioned Bork about privacy, the constitutional protection of women, free speech and other sensitive areas, Biden kept passing to Kennedy a football scorecard on Senate stationery that read: 12-0, then 18-0 and 24-0. Toward the end of Kennedy's turn, Biden's sheet read "30-0 if he keeps on."

"Bork displayed a cold, judicial attitude," Kennedy said. "His background is economics and antitrust and he applied that kind of thinking to privacy and civil rights. It sounded terrible."

Kennedy says what was essential in beating Bork was the host of popular concerns about the judge's stands. Civil rights may have been a prominent issue for some southerners but, not wanting to appear to be bound to special interest groups, they could also refer to privacy and women.

Podesta said the apparent success of the anti-Bork efforts has much to do with the ability of opponents to set the agenda for debate. "We tried as often as possible to talk about cases from the 1920s and 1940s that Bork had attacked to show how fundamental his disagreement was," he said.

Finally, after the major events of the hearings were over, Kennedy said he realized that instead of sitting and listening to more liberal groups testify, he and Biden and others ought to be talking to senators. As a result, he met with the groups that planned to testify and discouraged them. They agreed and the hearings ended after 12 days. They had been expected to go longer.

THE WASHINGTON POST
July 16, 1987

BIDEN REJECTS SETTING DATE FOR VOTE ON BORK

Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.) yesterday rejected a Republican request that he set a "date certain" for a committee vote on the nomination of U.S. Appeals Court Judge Robert H. Bork to the Supreme Court.

However, Biden said that he expected the nomination to be ready for debate by the full Senate by October 1.

"We have no intention to hold up this nomination," he said.

The GOP request was made last week by Senate Minority Leader Robert J. Dole (R-Kan.) and Sen. Strom Thurmond (R-S.C.), ranking Republican on the Judiciary Committee. Aides to Thurmond have said he hopes to have the nomination cleared through the committee about October 1.

Biden has pledged repeatedly that the committee will not delay action on the Bork nomination, which is expected to set off a filibuster by Democratic opponents on the Senate floor.

He has also said that the issue should be settled by the "full Senate" even if the Judiciary Committee votes against the nomination. Hearings on the nomination are scheduled to begin September 15 and are expected to last about two weeks. (emphasis added)

In the United States Senate

A RESPONSE TO THE MAJORITY REPORT IN THE SENATE CONFIRMATION PROCEEDINGS OF JUDGE ROBERT H. BORK*

COMMITTEE FOR A FAIR
CONFIRMATION PROCESS

November 2, 1987

*NOTE: This Response was prepared for submission to the Senate during the debate on the nomination of Judge Bork. One of the "white papers" was delivered to the Senate before the debate was concluded and the vote taken on Friday, October 23, 1987. This Response will complete the record by presenting the original filing and seven additional white papers, together with certain related materials. It is submitted as a comprehensive statement of Judge Bork's side of the case.

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COMMITTEE FOR A FAIR CONFIRMATION PROCESS

November 2, 1987

TO THE HONORABLE MEMBERS OF THE U.S. SENATE:

The annexed materials comprise the full set of "white papers" produced by the Committee for a Fair Confirmation Process to aid Senators and their staffs during the recently concluded floor debate on the nomination of Judge Robert H. Bork to the Supreme Court. Each paper addresses a section of the majority report that the Committee on the Judiciary issued on the subject of Judge Bork's nomination. For the convenience of readers we have included the committee's majority and minority reports along with our materials. [see Appendix]

The "white papers" were written by fourteen experienced attorneys in New York and Washington who volunteered their services because they, like many of their fellow attorneys, were disturbed that a matter as serious as the nomination of a Supreme Court Justice should be decided in good part by a document as deficient as the majority report turned out to be. The "white papers" produced by these volunteer attorneys demonstrate that the report is so filled with errors, omissions, and distortions of Judge Bork's record that it fails to meet minimum professional standards of accuracy and fair argument.

One of these papers was released at the start of the full Senate's consideration of Judge Bork's nomination. Distribution of the others was interrupted by the sudden termination of

the Senate debate. We had hoped that these papers would help Senators to decide the issue on the basis of a balanced account of Judge Bork's career and thought rather than the partisan fragments that have constituted most of the public record. Though this hope has been disappointed, we still feel that the "white papers" should see the light of day. They will help in the important function of setting the record straight as to what really happened here. They will also serve, we hope, as a warning of what can happen to the level of public debate when the selection of judges becomes the occasion of an unrestrained public campaign.

Respectfully submitted,

COMMITTEE FOR A FAIR
CONFIRMATION PROCESS

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New York, New York

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

October 20, 1987

TO THE HONORABLE MEMBERS OF THE U.S. SENATE:

We submit herewith a Declaration by 23 federal judges of the Second Circuit on the subject of the excessive politicization of the nomination process by the introduction of extraneous forces and pressures. The position of the signatories is neither pro-Bork nor anti-Bork, but addresses what should be a central concern of all persons interested in safeguarding an independent judiciary.

COMMITTEE FOR A FAIR
CONFIRMATION PROCESS

By: Michael Armstrong
Michael Armstrong

Of Counsel,

Griffin Bell
Carla Hills
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Leonard Garment

NEW YORK

October 20, 1987

We, the undersigned judges of the Second Judicial Circuit of the United States, are fully mindful of the fact that confirmation of Supreme Court justices is the obligation and prerogative of the Senate. However, as citizens concerned with the rule of law and the independence of the judiciary we are disturbed by the nature of the debate that has attended the nomination of Judge Robert Bork to the Court. If the process of choosing judges comes to be dominated by partisanship rather than a regard for individual learning and temperament, our courts will be left without the judicial excellence on which they vitally depend. If the process pays too much deference to outside influences, the courts will lose their integrity and Senators will become unable to perform one of their most solemn duties under the Constitution.

We hope that in the last stage of the debate over Judge Bork the participants will show respect for these principles and come to the Senate floor with minds open to arguments on the merits.

Jacob Mishler, Senior DJ
Raymond Dearie, EDNY
Peter Leisure, SDNY
Lloyd MacMahon, Senior DJ
Charles L. Brieant, CJ-SDNY
Reena Raggi, EDNY
John R. Bartels, Senior DJ
Edward R. Korman, EDNY
Howard Schwartzberg, Bkrty. NY
Charles S. Haight, SDNY
Richard J. Daronco, SDNY
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Howard B. Munson, NDNY
I. Leo Glasser, EDNY
Mark Constantino, EDNY
Thomas P. Griesa, SDNY
Milton Pollack, Senior DJ
Shirley Kram, SDNY
Thomas J. McAvoy, NDNY

JUDGE BORK AND JUDICIAL RESTRAINT

(Reply to Majority Report, pp. 8-28)

The Judiciary Committee's majority report on the nomination of Judge Robert H. Bork criticizes his philosophy of judicial restraint. The Committee's criticism is surprising for two reasons. First, the report alternately criticizes Judge Bork for exercising either too much restraint or too little. Second, the report ignores Judge Bork's reputation throughout the legal community as being one of our nation's most articulate proponents of the virtues of judicial restraint. Judge Bork, both as a legal scholar and as a jurist, has eloquently and repeatedly expressed the view that judges must be unfailing in their duty to apply the rights guaranteed by the Constitution, while simultaneously refraining from imposing their individual views of what they think the Constitution should say but does not.

I. THE ROLE OF THE JUDICIARY

Judge Bork's theory of judicial restraint is sometimes termed "interpretivism" because it emphasizes that judges should interpret rather than create law. People of the opposite view are sometimes termed by their intellectual adversaries "judicial imperialists." Judge Bork has expressed a preference for the term "interpretivist" over the label "non-activist" precisely because he does not want to imply that "courts should be passive and not defend individual liberties. They should be very active in that field." (Tr. Sept. 18). Interpretivism, as Judge Bork has discussed in his writings, holds that a judge should refrain from

invalidating the acts of elected representatives of the people unless the reason for doing so may fairly be found in the Constitution. In other words, a judge's own personal belief that a law is good or bad is not sufficient cause for him or her to invalidate an act of the Congress or the executive. (See Bork, The Struggle Over the Role of the Court, National Review, Sept. 17, 1982.)

This seemingly innocuous doctrine, familiar to most high school civics students, lies at the heart of the controversy over Judge Bork's nomination to the Supreme Court. Notwithstanding the committee report's statements to the contrary, the doctrine is based on conventional and solid legal reasoning. Because judges are not elected by the people, Judge Bork argues, and are insulated from the political process by life tenure, the courts can maintain their legitimacy only by restraining themselves and applying only the law contained in the Constitution. If "the Constitution does not embody a moral or ethical choice," Judge Bork has written, "the judge has no basis other than his own values upon which to set aside the community judgment embodied in [a] statute. That, by definition, is an inadequate basis for judicial supremacy." (Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971).) That is why Judge Bork has opposed legal theories such as substantive due process, which other judges have used to strike down statutes by appealing to rights not found in the Constitution.

Contrary to the majority report, Judge Bork's mistrust of judicial legislation through a substantive due process does not

make him unique among judges and legal scholars. On the contrary, it puts him in the mainstream of modern American jurisprudence. Judge Bork's type of judicial restraint became established doctrine during the 1930's, saving much of the New Deal's legislation and ending the now-discredited era shaped by Lochner v. New York. (198 U.S. 45 (1905).) The three dissenting Justices in Lochner argued that nothing in the Constitution justified substituting the policy preferences of the Court for those of the state legislatures. The first dissenter, Justice Harlan, quoted a critique of judicial activism enunciated by the Supreme Court in Atkin v. Kansas, 191 U.S. 207, 223 (1903), that is nearly identical to Judge Bork's:

> No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true -- indeed, the public interests imperatively demand -- that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.

198 U.S. at 74 (Harlan, J., dissenting; quoting Atkin v. Kansas.)

The majority report's authors write as if they do not recognize that the judicial activism they seek to enshrine is identical to the long-discredited judicial activism represented by

Lochner. Nor does the majority admit to its readers that Judge Bork's view is descended in a direct line from Court decisions during the New Deal such as Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), which are now honored as cases in which the Court deferred to the will of the majority and progressive legislation was saved.

The majority report argues that Judge Bork's judicial restraint leads to "crabbed" readings of constitutional provisions and the stagnation of legal doctrine. This is itself a crabbed reading, to say the least, of Judge Bork's writings. As Judge Bork has clearly explained, judicial restraint merely requires:

> [t]hat you look at the Founders and the Ratifiers, and you look at the text of the Constitution, . . . and you look at the Federalist Papers and the Anti-Federalist Papers and so forth and so on and so on, to get [at] what the public understanding of the time was of what the evil was they wished to avert, what the freedom was they wished to protect. And once you have that, that is your major premise; and then the judge has to supply the minor premise to make sure to ask whether that value, that freedom, is being threatened by some new development in the law or in society or in technology today. And then he makes the old freedom effective today in these new circumstances.
>
> That is going to mean changing legal doctrine, evolving legal doctrine, in order to protect the original value or freedom that the Framers and Ratifiers of the Constitution wanted to protect.

r. Sept. 17 (emphasis added).

Judge Bork could not have been more explicit: He does not elieve that the courts must be forever limited to the precise ntentions of the Framers on particular subjects. Lest anyone

claim that he underwent a last-minute "confirmation conversion" on this subject, it should be noted that he has said the same elsewhere. Looking to original intent, Judge Bork put it in one article, does not mean "that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless." The Constitution provides a judge, he wrote, "not with a conclusion but with a major premise." The court supplying the law must "supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee . . . . A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty." (Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826-27 (1986); emphasis added.)

It is impossible to believe that the drafters of the majority report were unfamiliar with these dramatic passages. The report nevertheless fails to disclose to its readers that this evidence exists.

A comparison of two of Judge Bork's decisions as a member of the District of Columbia Court of Appeals illustrates the distinction he draws between "judicial imperialism" and the duty to protect constitutional rights. In Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), the plaintiff was a United States naval officer who was discharged for engaging in homosexual acts in a Navy barracks. The plaintiff claimed that the discharge violated

his right to privacy in connection with his sexual activities. Writing for a unanimous panel, Judge Bork reasoned:

> When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason. We stress, because the possibility of being misunderstood is so great, that this deference to democratic choice does not apply where the Constitution removes the choice from majorities . . . . We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one.

Id. at 1397.

It is worth noting that in a different case the Supreme Court later reached the same conclusion as Judge Bork. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

In contrast, the case of Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), concerned a libel action by a Marxist professor of political science against newspaper columnists Evans and Novak. The column at issue questioned Professor Ollman's abilities and biases as an academician. In a separate concurrence, Judge Bork noted that "a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion." Id. at 993. Faced with this new threat to the First Amendment, Judge Bork showed no hesitation in affording constitutional protection to the article involved, stating:

> There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision -- such as the first amendment -- whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges -- and certainly no office for a philosophy of judging -- if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy.

Id. at 995.

Once again, the thought could not be put more clearly.

Results aside, Dronenburg and Ollman reveal a consistent theory of judicial restraint. They show quite unambiguously that looking to the intent of the Constitution for guidance can simply not be called -- at least with any intellectual honesty -- a recipe for legal stagnation. We can well see why the majority would not like some of Judge Bork's decisions. But to dress this quarrel up as a charge of extremism or generally unbalanced thinking on Judge Bork's part is not even close to being justified.

When it comes to the field of antitrust law, the majority report has a very different bone to pick with Judge Bork. The report accuses him of being an "activist" in this area. (Majority

Report, p. 71.) This accusation is ostensibly grounded in the one antitrust opinion Judge Bork has written and in parts of his landmark treatise, The Antitrust Paradox.[1]

The Antitrust Paradox does indeed state that judges should apply the best economic analyses available when deciding whether the conduct before them violates the antitrust laws. By contrast, the majority report drafters undergo, on this issue, a convenient momentary conversion to "interpretivism." Their transformation is radical. Indeed, the report actually seems to imply that a properly respectful and non-activist judge should apply in these cases only the sort of economic analysis that was in vogue when the antitrust laws were first passed. The report can reach this conclusion only because it wholly fails to consider carefully the language of the antitrust statutes themselves. The antitrust laws were drafted precisely so as to give the courts the great discretion necessary to decide what particular forms of conduct constitute restraints of trade. Having been given this discretion by Congress, the courts are not only permitted but obligated to use their best efforts to analyze whether questioned conduct is indeed anticompetitive. See R. Bork, The Antitrust Paradox, 410 (1978).

Judge Bork's one antitrust opinion, Rothery Storage & Van v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 880 (1987), is a fairly straightforward unanimous decision with one brief concurrence. Rothery faithfully

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[1] Current debates over antitrust doctrine are long and learned, but the majority report's charge can be dealt with more briefly.

applies the Sherman Act to a particular set of facts. While the majority report need not agree with the Court of Appeals' unanimous conclusion that the conduct involved in Rothery was not anticompetitive, it is simply not responsible to call Judge Bork an activist based on the conclusion he reached.

II. RESPECT FOR PRECEDENT

As part of its critique, the majority report accuses Judge Bork of not respecting precedent. (Majority Report, pp. 21-29). It is somewhat difficult to make out the argument behind the charge. But the truth of the matter is that Judge Bork's attitude towards precedent is certainly within the mainstream of judicial thought, and his respect for precedent may be greater than that of most judges. Judge Bork's views on precedent certainly do not vary greatly from those of any current member of the Supreme Court.

Respect for precedent, also known as the doctrine of stare decisis, is a venerable and respected tenet of American law. Justice Brandeis' well known formulation expressed its power and its limits:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial

> and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932).

Judge Bork has expressed complete agreement with Justice Brandeis on this issue. Judge Bork testified before the committee that the Supreme Court must follow precedent in order to preserve "confidence in the Court by not saying that this crowd just does whatever they feel like as the personnel changes." On those occasions when the Court must nevertheless consider overruling precedent it thinks to be incorrect, it must do so because it is sworn to uphold the Constitution, not its own case law. (Tr. Sept. 16).

Judge Bork has also plainly stated that some decisions should not be overruled even though they appear to have been incorrectly decided. In Judge Bork's view,

> There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not to be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.

A Talk with Judge Robert H. Bork, District Lawyer (May/June 1985).

Judge Bork has said that he would reverse prior decisions only under limited circumstances. First it would have to be

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clear, of course, that the prior decision was wrong. But then a whole series of other considerations would arise: the need for stability in a particular doctrine, the private expectations of the citizenry, the existence of a right which has been internalized, the private or public institutions which may have grown up around the prior decision, the need to preserve confidence in the Court, and the tendency of the prior incorrect decision to create a dynamic force that continues to do harm. If on balance these factors favor overruling a precedent, then Judge Bork would vote to do so, but Judge Bork's factors weight the scale overwhelmingly against overruling. Examples of cases which Judge Bork would not overrule even if they were incorrectly decided are Bolling v. Sharpe, 347 U.S. 479 (1954), (school desegregation in the District of Columbia) and Shelley v. Kraemer, 334 U.S. 1 (1948) (refusing to enforce racially restrictive real estate covenants). In his comment on Bolling, Judge Bork recognized the anomaly, indeed the practical impossibility, of desegregating the States and not the District of Columbia. He added, however, that, even though the constitutional ground of Bolling was not sound, other judicial or legislative approaches were available to accomplish the necessary result.

Judge Bork's approach to precedent, although better articulated than that of most judges, is actually quite conventional. Most, if not all, of the Justices currently on the Supreme Court would be thoroughly comfortable with such an approach. The majority report's drafters, for reasons they do not justify, are not.

CONCLUSION

Judge Bork's beliefs about judicial restraint are well within the ambit of traditional judicial opinion, even if they are not within the accepted limits of the majority report's own legal philosophy. Judge Bork simply and quite faithfully follows the path already trod by such esteemed jurists as Frankfurter and Harlan. As a Circuit Court Judge, Judge Bork has established an exemplary record of prudent and respectful opinions. Obviously, reasonable people differ over the results reached in his decisions or even over the arguments he employed. But the bogus suggestion by the majority -- that Judge Bork's philosophy of judicial restraint is foreign to American jurisprudence -- can spring only from the majority's disturbing refusal to accept the legitimacy of any legal philosophy but its own.

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JUDGE BORK AND PRIVACY

(Reply to Majority Report, pp. 30-36)

The majority report of the Senate Judiciary Committee considering Judge Robert Bork's nomination to the Supreme Court devotes a seven-page section to a discussion of the "right to privacy." The majority paints Judge Bork as an extremist defending "a lonely position" regarding a general right of privacy. The report is false both in what it says about Judge Bork and in what it fails to mention at all. Nowhere in this section does the majority mention the word "abortion," even though abortion is perhaps the chief element in today's concerns about privacy. Nowhere does the majority mention Roe v. Wade, 410 U.S. 113 (1973).

The majority report's argument is as follows: (1) Judge Bork disagrees with the reasoning of Griswold v. Connecticut, 381 U.S. 479 (1965), in which Justice Douglas relied on a "right to privacy" to strike down a Connecticut contraception statue; (2) this "right to privacy" is a fundamental one that has existed since the Constitution was written; (3) Judge Bork is literally alone in not admitting the existence of this privacy right; (4) as a Supreme Court Justice, Bork would overrule Griswold (thereby exposing married couples throughout the country to the danger of anti-contraception legislation); (5) if Bork were on the Supreme Court, he would abandon or severely limit the right to privacy, thereby cutting off the enlightened expansion of that concept.

The arguments on each of these issues are filled with almost inexplicable inaccuracies and illogic.

I. JUDGE BORK IS IN OPPOSITION TO THE REASONING IN GRISWOLD

The majority report spends over four of its seven pages proving that Judge Bork disapproves of Justice Douglas' opinion in Griswold v. Connecticut. (Majority Report, pp. 30-34.) Indeed, this is the only item of Judge Bork's beliefs that the majority ever discusses. The majority is correct. Judge Bork vigorously disapproves of the reasoning in Griswold.

II. THE "RIGHT TO PRIVACY," AS ENUNCIATED IN GRISWOLD, IS HARDLY "FUNDAMENTAL"

The majority report quotes Professor Kathleen Sullivan of the Harvard Law School as saying that the right to privacy discussed in Griswold has existed for 75 years. (Id. at 35.) The report quotes Chairman Biden as going even further in his concluding remarks at the hearing and saying that the right has existed for 200 years. (Id. at 34.) Yet the majority staff elsewhere states that the right to privacy was "first enunciated in Griswold v. Connecticut" (Id. at 30), a case decided in 1965.

The majority is deliberately confusing two different "rights to privacy." The privacy concepts woven into the Constitution -- that is, the privacy rights to which Professor Sullivan and Senator Biden must be referring if they are talking about rights which have existed for 75 to 200 years -- are rights which Judge Bork unquestionably accepts.

Judge Bork clearly said so in his first published criticism of Griswold in 1971, where he expressly agreed with part of Justice Douglas' discussion in the case. Justice Douglas wrote

in Griswold that the "specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance," and that "[v]arious guarantees create zones of privacy." 381 U.S. at 484. Judge Bork agreed.[1]

During the hearings, Judge Bork again agreed that there are "rights of privacy" emanating from various specific Constitutional guarantees. He pointed specifically to the protections against government intrusion that are quite obviously afforded by the Constitution's First and Fourth Amendments. He wrote in his October 1 letter to the Judiciary Committee (at p. 7): "A judge who fails to give these freedoms full and fair effect fails in his judicial duty." Judge Bork also testified that "marital privacy is a right older than the Bill of Rights, and that is why it has always been respected . . . a right deeply built into our society . . . a very important thing." (Tr., Sept. 19, pp. 214-15.)

Judge Bork has consistently objected, however, to the "right of privacy" invented by Justice Douglas in the Griswold case, on the grounds that Douglas makes an unreasoned "leap" from the "rights of privacy" emanating from the specific Constitutional guarantees to a generalized, unspecific right of privacy. As Judge Bork wrote in 1971: "[Justice Douglas] did not dis-

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[1] He pointed out that these "zones" protected not only "privacy" but also "freedom," because "the individual is free within these zones, free to act in public as well as in private." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8-9 (1971).

close . . . how a series of specified rights combined to create a new and unspecified right." Neutral Principles, supra, at 9.[2]

If the right to privacy as enunciated by Justice Douglas in Griswold is "fundamental," as the majority report claims, it is curious that no one had recognized it for the 175 years of our Constitution until the day Justice Douglas conceived it. Justice Black (joined by Justice Stewart) was puzzled too. As Justice Black said in his dissent in Griswold: "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions." He valued his privacy, said Justice Black, but found it hard to see how this feeling alone could be used to keep government out of an area "unless," he said, it was "prohibited by some specific constitutional provision." 381 U.S. at 509-10.

III. JUDGE BORK IS ANYTHING BUT EXTREME IN CRITICIZING THE GRISWOLD OPINION

Having posited a "fundamental" but undefinable right of privacy, the majority attempts to describe Judge Bork as an "extremist" for finding fault with it. But Judge Bork is joined by a host of other eminent legal minds in concluding that the right

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[2] The majority report's confusion between the historic and the Griswold versions of the right of privacy is reflected in the title as well as in the first sentence of the section, each of which equates the "right of privacy" with "the right to be let alone" elaborated on by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478 (1928). Brandeis spoke of exactly the kind of privacy right which Judge Bork endorses, one rooted in the Fourth and Fifth Amendments to the Constitution.

created in Griswold and expressed most significantly in Roe v. Wade is unjustifiable:

- Professor Kurland has characterized both Griswold and Roe as "blatant usurpation of the constitution making function."[3]

- Professor Gerald Gunther, a self-described "card-carrying liberal democrat," has called Griswold a badly reasoned return "to the discredited notion of substantive due process." (Minority Report, p. 259).

- Dean Ely, also a liberal, has described Roe v. Wade as "frightening" in that its privacy right "is not inferrable from" the Constitution, and has written that "it is not constitutional law and gives almost no sense of an obligation to try to be."[4]

- Archibald Cox has argued that Roe v. Wade is not legitimate constitutional decision-making.[5]

- Alexander Bickel has written that the Roe decision constituted legislative, not judicial, action.[6]

Moreover, four sitting Justices of the Supreme Court have expressed similar reservations about the intellectual validity of the Griswold-Roe "privacy" rationale. See, e.g., Roe, supra, 410 U.S. at 171-78 (Rehnquist, J., dissenting); id. at 222 (White, J., dissenting) (calling Roe "an exercise of raw judicial power"); City of Akron v. Akron Center for Reproductive Health,

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3 Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 25 (1978-79).

4 Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 936, 947, 949 (1973) (emphasis in original).

5 A. Cox, The Role of the Supreme Court in the American Government, 113-14 (1976).

6 A. Bickel, The Morality of Consent, 28-29 (1975).

Inc., 462 U.S. 416, 452 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting); Thornburgh v. American College of Obstetricians, ___ U.S. ___, 106 S. Ct. 2169, 2216 (1986) (White, Rehnquist and O'Connor, JJ., dissenting); Bowers v. Hardwick, ___ U.S. ___, 106 S. Ct. 2841 (1986) (White, J., joined by Burger, C.J., and Powell, Rehnquist and O'Connor, J.J.; Burger, C.J., and Powell, J. filed concurring opinions) (upholding a state statute against sodomy as applied to homosexuals).

In an attempt to explain away the army of respected scholars and jurists who join Bork in attacking the Griswold-Roe right of privacy, the majority report quotes an extraordinary statement by Professor Sullivan:

> There are two sides to the issue on [the] scope [of the right to privacy], but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream.

ajority Report, p. 35.

The distinction is inexplicable in light of the unequivo- l nature of many of the critics' statements. For example, stice Black flatly stated in his dissent in Griswold:

> The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not.

l U.S. at 508 (emphasis added).

Justice Stewart's Griswold dissent is similarly emphatic:

> With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

381 U.S. at 530 (emphasis added).[7]

Attempting to rationalize Justice Black's statement in Griswold, Professor Sullivan lamely attempted to maintain her position by citing three decisions, joined without comment by Justice Black, in which "he did not say that he disagreed with the existence of the right of privacy." (Tr., Sept. 29, p.17.) It would have been bizarre for Justice Black to have expressed his disagreement with the "right to privacy" in any of the three decisions, since none of them mentions or relies on the "right to privacy" or any concept of privacy, and the word "privacy" does not even appear in any of them. The cases are Skinner v. Oklahoma, 316 U.S. 535 (1942); Bolling v. Sharpe, 347 U.S. 497 (1954); and Loving v. Virginia, 388 U.S. 1 (1967).[8] All three decisions are made expressly on equal protection grounds, and none relies in any way on privacy.

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7 Later, accepting Griswold as precedent, Stewart concurred in Roe v. Wade. 410 U.S. at 168.

8 Bolling ordered desegregation of the District of Columbia schools; Skinner invalidated a state penal law that required sterilization of certain habitual offenders but not others "who [had] committed intrinsically the same quality of offense," 316 U.S. at 541; and Loving invalidated state laws preventing interracial marriages. Bolling and Skinner were decided long before Griswold; and Loving, decided two years after, makes no reference to Griswold.

IV. OVERRULING GRISWOLD WOULD NOT HAVE SIGNIFICANT PRACTICAL CONSEQUENCES

Even before the hearings, demagogic scare tactics were used by Judge Bork's opponents, who said that if Griswold were overturned police would be free to break down the bedroom doors of married couples in search of contraceptives. The theme, somewhat muted, continues in the discussion in the report. In fact, Griswold never had any factual significance. It was a test case brought by people who went to considerable lengths to get themselves arrested for violating a law that had never been enforced in a state where contraceptives were sold openly.

It is true that a successful challenge to Justice Douglas' right of privacy would have practical consequences if it came in the course of the reversal of the decision in the abortion case Roe v. Wade. In light of these possible consequences, it is stunning that the majority does not discuss Roe v. Wade at all. It is worth pointing out the irony, though, that if Judge Bork is not confirmed it is possible -- indeed, likely -- that whoever is appointed to the Court in his place will not have his extraordinarily principled respect for precedent and might more easily overturn Supreme Court opinions like Roe v. Wade with which he or she does not agree.

V. ABANDONMENT OF THE GRISWOLD-ROE RIGHT OF PRIVACY WOULD NOT STULTIFY PROGRESS

The majority expresses its concern that Judge Bork, as Justice Bork, might overturn Griswold, with dire consequences, or at least so limit it in future cases as to prevent the privacy

concept from expanding with changing times. But the majority says nothing concrete about these future issues and consequences. The majority thereby avoids having to deal with the fact that on issues from contraception to abortion, privacy rights are now in little danger from democratic legislatures. The majority also avoids having to discuss the specific expansions of the right to privacy that are likely to occur only through court action. One of the majority's witnesses, Professor Laurence Tribe, wrote in 1978 about the logical areas of expansion:

> Thus, although it is probably the case that the protection provided by Griswold v. Connecticut was initially limited to acts occurring within a traditional, state-sanctioned relationship, and perhaps to acts relevant to procreative autonomy, it seems clear that "the liberties of adult intimacy in our society are [too] fundamental" to be indefinitely limited to conduct implicitly sanctioned by the state's compact with the partners to a marriage.

L. Tribe, American Constitutional Law (1978) 944 (footnotes omitted).

Tribe anticipated the "eventual unfolding of doctrine in this area" to reach "homosexuality" (Id. at 944), "polygamy, adultery, and bestiality, as well as variations such as group sex which are generally dealt with under sodomy and fornication laws . . . " (Id. at 946).[9]

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[9] In his testimony before the Judiciary Committee, Professor Tribe described the right of privacy, which he claimed to be menaced by Judge Bork, in considerably more domestic terms, e.g., "the rights of individuals and families to decide for themselves basic matters of marriage, child-bearing and child-rearing"; "A married couple's intimacies in the bedroom"; "what a married couple does or what parents do with their children"; "the most down-to-earth fundamental

(Footnote Continued)

Professor David Richards, another anti-Bork witness who testified as an expert on the right of privacy, has written that "there are no good moral arguments for criminalizing consensual adult commercial sex and its punishment is a violation of the rights of the individual," and that "the right to use many drugs currently criminalized is one of the rights of the person which the state may not transgress." (Tr., Sept. 29, pp. 67-69.)

The majority does not speak of these things any more than it talks about the real consequences of an overruling of Griswold for the availability of contraception. Instead, the majority chooses to deal in hypotheticals and presents a parade of horrors that ostensibly would have resulted from the adoption of Judge Bork's view that it was wrong to create the Griswold-Roe right of privacy. Eight cases are listed as establishing rights which Americans supposedly would not have today were it not for "rights recognized by the Supreme Court." (Majority Report, p. 36). With good reason, the report does not pretend that these rights all spring from a right of privacy enunciated in Griswold. Three of the decisions, none of which involved what was described as the right of privacy or used the term privacy, were handed down from 23 to 42 years before Griswold.[10] Two cases decided after

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(Footnote Continued)
things about marriage, family, parenthood." (Tr., Sept. 22, pp. 13, 106-107.)

10 Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Skinner v. Oklahoma, 316 U.S. 535 (1942). Skinner was an equal protection case. Meyer and Pierce were substantive due process cases from the Lochner era, when the Court saw no need to trace rights to particular constitutional provisions; the rights recognized
(Footnote Continued)

Griswold do not rely on Griswold or on the right to privacy. Zablocki v. Redhail, 434 U.S. 374 (1978) (equal protection); Turner v. Safley, 107 S. Ct. 2254, 2265 (1987) (relying on equal protection cases to establish a fundamental right to marry and suggesting that such right may be traceable to the First Amendment, since "the commitment of marriage may be an exercise of religious faith"). In the sixth case, alternative grounds existed to support the result. See Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (Stevens, J., concurring on grounds of unreasonable deprivation of property and taking without just compensation). The remaining example involved Griswold itself and a case, following Griswold, decided on closely similar facts.

CONCLUSION

There are several areas in which we believe the majority report's arguments to be wrong, but the arguments in the privacy section are truly baffling. The debate in the legal community over Justice Douglas' idea of the right of privacy is so well known that it is not only wrong but self-defeating to call Judge Bork extreme on the issue. The professed alarm over Griswold is wholly out of proportion to any real privacy threats in the area Griswold dealt with. It is in this context that the failure to discuss Roe v. Wade becomes a suspicious absence. It is hard to avoid the conclusion that Judge Bork's alleged threat to

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(Footnote Continued)
in both cases may well emanate from the First Amendment. See Wisconsin v. Yoder, 406 U.S. 205 (1972).

privacy, for which there is so little evidence, is a way of emphasizing his perceived threat to Roe v. Wade without having to talk openly in support of a decision that many people do not like.

A tactic such as this, which does its job by trying to paint a good man with the "extremist" label, is dishonorable and wholly inappropriate in a debate on a serious subject.

JUDGE BORK AND CIVIL RIGHTS

(Reply to Majority Report, pp. 36-45)

By repeatedly charging Judge Bork with "hostility" to civil rights (e.g., pp. 36, 41, 44), the majority report attempts to paint Judge Bork as a racist, even while it graciously pretends to refrain from making that charge. The report's civil rights discussion fails even to mention Judge Bork's numerous civil rights victories as Solicitor General and his many pro-civil rights decisions as a Circuit Judge.

Instead, the report's civil rights discussion entirely omits Judge Bork's civil rights accomplishments and deals only with his writings as a professor. Worse, the report mischaracterizes Professor Bork's writings, which recognized the need for civil rights advances even while they stressed the importance of principled Constitutional decision making.

The Report unfairly concludes that:

> In light of Judge Bork's demonstrated hostility to the fundamental role of the courts in protecting civil rights, the committee strongly believes that confirming Judge Bork would create an unacceptable risk that as a Supreme Court Justice, he would reopen debate on the country's proudest achievements in the area of civil rights and return our country to more troubled times.

Majority Report, pp. 44-45.

The baseless implication that Judge Bork desires to "turn back the clock" is refuted by Judge Bork's civil rights record, a record the majority report suppresses.

I. JUDGE BORK'S CIVIL RIGHTS RECORD

The majority report's discussion of civil rights quotes Senator Kennedy's remark to Judge Bork: "[w]ith all your ability, I just wish you had devoted a little of your talents to advancing . . . equal rights." (Majority Report, p. 44.) But with great unfairness the report refuses to present the answer: As Solicitor General, Judge Bork filed amicus briefs and argued in support of minority litigants or expanded civil rights in 17 of 19 cases and had a substantial success rate in those cases. To the rhetorical question repeatedly put: "Where was Judge Bork while civil rights victories were being won?" the answer is: "Making the winning arguments in front of the Supreme Court."

The report also ignores Judge Bork's judicial record in civil rights cases such as Emory v. Secretary of the Navy, 819 F.2d 291 (D.C. Cir. 1987), in which he rejected the argument that Constitutional guarantees against racial discrimination were inapplicable to military promotions; Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985), affirming a finding of discrimination against female stewardesses; Omosky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983), holding the Equal Pay Act applicable to the Foreign Service; Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), upholding discrimination claims by female Foreign Service officers; Doe v. Weinberger, 820 F.2d 1275 (D.C. Cir. 1987), in which a National Security Agency employee discharged for homosexuality was held entitled to a hearing; Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405 (D.C. Cir. 1985), in which proof of

discriminatory motive was held unnecessary under Title VII; and the voting rights case County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) and 596 F. Supp. 35 (D.D.C. 1984).

The majority withholds the information necessary even to begin to make a fair and balanced evaluation of Judge Bork's civil rights record.

II. THE CLAIM THAT JUDGE BORK HAS "OPPOSED CIVIL RIGHTS LEGISLATION"

The report's discussion of civil rights focuses on Judge Bork's opposition to the public accommodations provisions of the Civil Rights Act of 1964. (Majority Report, p. 37.) The majority concedes that Judge Bork publicly modified these views in early 1973, and they do not question his sincerity in doing so. Nevertheless, they argue that Judge Bork's early position may properly be considered in assessing his nomination.

The report points to an article Judge Bork wrote in the New Republic in 1963, which the report characterizes as stating "that the principle underlying the proposed ban on discrimination in public accommodations was one of 'unsurpassed ugliness.'" (Id. at p. 37.) The implication is that Judge Bork applied the term "unsurpassed ugliness" to some civil rights principle, thereby showing his hostility to desegregation. This is a vicious misrepresentation which has been widely popularized by Judge Bork's attackers. In fact, the word "ugliness," as used in Judge Bork's article, was taken from a statement by Mark DeWolf Howe that was repeated by Judge Bork to describe the racism that Judge Bork

emphatically found "abhorrent." He merely continued the theme in commenting that for the federal government to allow restrictions on individual liberty to turn into a form of coercion would similarly be a kind of "ugliness." The New Republic noted at the time that Bork's views were shared by many Americans, including many of its own readers.

The majority must know that Judge Bork's New Republic position was well within the mainstream of public debate at the time and that he changed his thinking on the subject, publicly, over 14 years ago. It is stunningly unfair to dredge up and distort this 24-year-old quote in order to plant the false impression that Judge Bork is hostile to civil rights.

III. JUDGE BORK'S CRITICISM OF SHELLEY V. KRAEMER

The majority report proclaims in bold-faced type that "Judge Bork has criticized the decision banning enforcement of racially restrictive covenants," Shelley v. Kraemer, 334 U.S. 1 (1948). The clear -- and false -- implication is that Judge Bork supports enforcement of such covenants. The report fails to mention that it was Robert Bork who argued and won "the other decision" that bans not only enforcement of racially restrictive covenants, but a whole range of discriminatory private arrangements -- Runyon v. McCrary, 427 U.S. 160 (1976).

The majority cannot have failed to notice that Judge Bork's criticism of Shelley v. Kraemer concerns only the legal issue of "state action." The majority must also know that this

"state action" reasoning in Shelley v. Kraemer has been universally criticized and even ridiculed. L. Tribe, American Constitutional Law, 1156-57 (1978), stating the "critical consensus" of scholars that Shelley's reasoning is wrong; Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, (1959); Henkin, Shelley v. Kraemer, Notes for a Revised Opinion, 101 U. Pa. L. Rev. 473, 474 (1962).

The report does not honestly acknowledge the "critical consensus" against Shelley. Instead, the majority sends out an alarm: "In light of Judge Bork's harsh criticism of Shelley, the committee entertains substantial doubt as to whether and how the nominee would apply that fundamental decision in future cases." (Majority Report, p. 38.) But the professed doubt is disingenuous. As the report's writers must know if they have done their work responsibly, Shelley is recognized to have little or no significance beyond its facts. Indeed, in Evans v. Abney, 396 U.S. 435 (1970), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court refused to broaden the ruling in Shelley. Moreover, Solicitor General Robert Bork's winning argument in Runyon v. McCrary, supra, makes further application of Shelley unnecessary as to even its own facts. Thus, Judge Bork was quite correct and gave no evidence of hostility to civil rights when he testified that Shelley has "no generative force" and therefore "is not a case worth reconsidering." (Majority Report, p. 38.)

The majority report cites three cases in an attempt to dispute Judge Bork's contention that Shelley v. Kraemer is not

likely to require interpretation or analysis in the future.[1] Two of the cases were decided before Runyon v. McCrary, and in none of the three cases is any expansion or interpretation of Shelley v. Kraemer an issue. The truth is that Shelley is still cited when its precise holding is useful in a case factually "on all fours," and it is sometimes used to bolster an opinion which is amply justified by "state action" doctrines that do not go as far as the doctrine in Shelley. But, contrary to what the report implies, there is no serious contention in the field that the reasoning in Shelley v. Kraemer should be expanded beyond the facts of the particular case. It is, and has been described by virtually all scholars of all persuasions as, a dead letter, even if it was useful at the time of its pronouncement in achieving a desired result. If confirmed, Judge Bork will never have to deal with Shelley v. Kraemer; if he does, his views with respect to it are no different from those of anyone else who might be eligible for the Court.

IV. JUDGE BORK'S CRITICISM OF THE "ONE PERSON, ONE VOTE" MANDATE

The majority accuses Judge Bork of "a deeply rooted hostility to the role of the courts in protecting individual rights and the integrity of the political process" (Majority Report, p. 41), because of his criticism of Reynolds v. Sims, 377

[1] Barrows v. Jackson, 346 U.S. 249 (1953); Moose Lodge v. Irvis, 407 U.S. 163, 171, 179 (1972); Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1984).

U.S. 533 (1964), which requires "one person, one vote" apportionment in state legislatures. This accusation defames as "hostile" to civil rights not only Judge Bork, but also Justice Harlan and other eminent jurists and scholars who have criticized Reynolds.

The majority lumps together both Reynolds and Baker v. Carr, 369 U.S. 186 (1962), as "one person, one vote" cases opposed by Judge Bork. In fact, Judge Bork testified to his support of Baker v. Carr, in which the Court held that state legislative apportionment is subject to judicial review. Judge Bork also testified explicitly to his view that the courts may invalidate racially discriminatory apportionment and districting schemes under the equal protection clause.[2]

Judge Bork's criticism of Reynolds is that its mechanical "one person, one vote" rule is "not consistent with American political history, American political theory, with anything in the history or the structure or the language of the Constitution." (Majority Report, p. 40.) His criticism is fully supported by Justice Harlan's scholarly and lengthy dissent in Reynolds, which painstakingly argues that the Reynolds rule is inconsistent with the history of the nation, the Constitution, and the Fourteenth Amendment. 377 U.S. at 589-632. Harlan listed the many factors -- such as geographical considerations, urban-rural balance,

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2 Furthermore, Judge Bork testified to his support of legislation to prevent discriminatory apportionment such as the Voting Rights Act, which prohibits changes in apportionment or districting that would "have the effect of denying or abridging the right to vote on account of race or color." Judge Bork's decisions have given that Act an expansive interpretation. See County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) and 596 F. Supp. 35 (D.D.C. 1984).

and theories of bicameralism -- that had historically been considered permissible and valuable in apportionment and had been abrogated by the Reynolds decision. See 377 U.S. at 622-23 (Harlan, J., dissenting). See also A. Bickel, The Supreme Court and the Idea of Progress, 173-74 (1970).

The mechanical "one person, one vote" rule continues to raise problems in application and deep division in the Court. See, e.g., Karcher v. Daggett, 462 U.S. 725 (1983) (5-4 decision; Burger, C.J. and Powell, White and Rehnquist, J.J., dissenting, citing the mechanical rigidity of "one person, one vote"). But the point is not whether the majority's view is superior to that of Justice Harlan and Judge Bork. Instead, the problem is that the majority report, by innuendo, has attempted to smear Judge Bork as a racist for taking the same principled position taken by Justice Harlan. It is an understatement to say that the majority's charge is grossly unfair and intellectually dishonest.

V. THE POLL TAX DECISION

The majority report attacks Judge Bork for criticizing the reasoning of Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), which invalidated poll taxes. Judge Bork shows, says the Report, "a pronounced lack of sensitivity [as] to how the law affects real persons." "Insensitivity" is one of the code words that have developed around the civil rights issue and are by now well understood. "Insensitivity" in a poll tax case means that the majority is again trying to paint Judge Bork as a racist.

They are doing so because of his views about a divided Court decision, one from which Justices Black, Harlan and Stewart dissented and one which did not involve race.

The majority incorrectly claims that Harper was a racial discrimination case, citing in support the Committee testimony of a witness who quoted a fragment of a sentence from a footnote in the Harper decision. (Majority Report, pp. 39-40.) The part of the sentence that the witness deleted, however, clearly states that the Court was not deciding Harper on grounds of racial discrimination:

> [We] do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end [of disenfranchising blacks].

383 U.S. at 666 n.3.

Thus, Judge Bork's testimony that in Harper there was no allegation or evidence of racial discrimination is correct, and the majority's attack on Judge Bork's testimony in this regard is disingenuous and misleading.

Moreover, the majority cuts off Bork's final answer in the colloquy quoted on page 39 of the report. Here is what the majority deletes from Judge Bork's answer:

> Had [the Harper Court] discussed it in those terms so that it was shown to be a discriminatory poll tax, it certainly should have been struck down. I have no objection to that; not only no objection to it, I affirmatively agree with that. I always have.

Tr., Sept. 18, p. 17.

The majority report concludes, relying in part on the testimony of the one witness who misstated Harper, that the poll tax in Harper should be unconstitutional per se. Judge Bork is not the only one who disagrees with the majority's conclusion: So have Justices Hughes, Brandeis, Stone, Cardozo, Black, Frankfurter, Jackson, Reed, Burton, Clark, Minton, Vinson, Harlan and Stewart. (Minority Report, pp. 246-47.) If the majority's loaded charge of "insensitivity" were correct, it would apply with equal force to all of these eminent jurists.

VI. LITERACY TESTS

Once again the majority accuses Judge Bork of "hostility . . . to the role of the courts in ensuring our civil rights" (p. 44), this time because he (with Justices Harlan and Stewart and scholar Archibald Cox) has criticized Katzenbach v. Morgan, 384 U.S. 641 (1966). This charge is particularly ironic because, in criticizing Morgan, Bork and the others have actually been defending "the role of the Court" as the ultimate arbiter of the Constitution.

The report seems to misunderstand the criticism of Morgan made by Judge Bork and others. In Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959), the Court had held that literacy tests do not violate the equal protection clause unless they are used in a discriminatory manner. Thereafter, Congress enacted two statutory provisions: One suspended the use of literacy tests in states with a history of discrimination while the other barred

certain literacy tests even without any evidence of discrimination. Both provisions were enacted pursuant to Section 5 of the Fourteenth Amendment, which gives Congress power to "enforce, by appropriate legislation, the provisions" of that amendment.

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court upheld the statutory provision concerning discriminatory literacy tests. Judge Bork agrees with this holding, as he testified in his 1973 confirmation hearings for the position of Solicitor General.

In Morgan, the Court upheld the statutory provision concerning nondiscriminatory literacy tests. The point of Judge Bork's criticism was that the statutory provision at issue in Morgan did not merely "enforce" the equal protection clause, pursuant to the Fourteenth Amendment, but redefined its scope. The legislation thus allowed Congress to overrule the Supreme Court's interpretation of the clause in Lassiter and to displace the court as final arbiter of the Constitution under Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

The majority relies on and quotes at length the testimony of Laurence Tribe, who happens to disagree with Justices Harlan and Stewart, Judge Bork and Professor Cox on this legal issue. Disagreement with Professor Tribe is not a fair basis for accusing the others of "hostility" to civil rights.

Finally, the majority report distastefully implies that Judge Bork has an anti-civil rights agenda by quoting Professor Tribe's testimony that "it does seem . . . a bit strange that someone who is deferential to the will of the majority . . . would

be so activist as to strike down rational congressional legislation." (Majority Report, p. 43.) The majority conveniently omits to mention Judge Bork's testimony against the proposed Human Rights Life Bill on the same ground that he criticizes Morgan -- hardly the actions of an anti-civil rights activist. On the contrary, Judge Bork's positions demonstrate principled consistency.

CONCLUSION

Judge Bork's actions and record as Solicitor General and Circuit Judge show that he has been a forceful and effective advocate of civil rights. At the same time, he is concerned about maintaining the integrity of Constitutional principles and processes, and he refuses to reach results which, while superficially popular, violate those basic principles.

The report's refusal to recommend an otherwise eminently qualified jurist because of this kind of complexity in his views reveals a highly disturbing notion of the role of the federal judiciary in relation to the nation's political life.

JUDGE BORK AND WOMEN'S RIGHTS

(Reply to Majority Report, pp. 45-50)

The majority report accuses Judge Robert Bork of creating "deep uneasiness for persons concerned with equality of the sexes." (Majority Report, p. 50.) The idea that Judge Bork's confirmation would threaten women's rights is perhaps the most blatant of the misrepresentations put forth by the campaign against him.

The majority report is seriously flawed in the following respects: First, it ignores Judge Bork's advocacy of equal treatment of the sexes, and equally ignores his decisions on the subject. Second, the report misrepresents Judge Bork's views and testimony before the committee regarding gender discrimination and the equal protection clause of the Fourteenth Amendment. Third, it misstates what Judge Bork has said about use of the "reasonable basis" test in applying the equal protection clause to gender discrimination claims. Fourth, it makes the baseless assertion that Judge Bork's views on equal protection are not consistent with his overall judicial philosophy.

I. JUDGE BORK'S RECORD ON THE EQUALITY OF THE SEXES

The majority report simply and wholly omits Judge Bork's exemplary record on the subject of equality of the sexes. For example, while Solicitor General, Judge Bork submitted an amicus brief in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), in which he argued that discrimination on the basis of pregnancy was illegal sex discrimination. While the Government was not a party

to this case and was not compelled to take a position on that issue, Judge Bork nonetheless exercised his discretion to file an amicus brief because he believed the issue involved was of critical importance to women.

As a judge on the Court of Appeals for the District of Columbia, Judge Bork has joined in several far-reaching decisions that liberally applied statutes which prohibit discrimination based on gender. For example, in Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983), he joined in reversing a district court decision which had denied women in the Foreign Service the protection of the Equal Pay Act. In Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985), he voted to require that female stewardesses be paid no less than male pursers, even though the job descriptions were nominally different. And in Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), he voted to reinstate a class action for sex discrimination brought by female employees against the State Department, on the ground that the existence of intentional discrimination may be inferred from statistical evidence alone.[1]

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[1] Judge Bork's detractors have relied repeatedly on his opinion in Cosgrove v. Smith, 697 F.2d 1125, 1134 (D.C. Cir. 1983), a sex discrimination suit brought by male federal prisoners. But this reliance is misplaced. Judge Bork concurred with the majority in part and dissented in part. The portion on which he dissented concerned an issue that was not the prisoners' sex discrimination claim. On the discrimination claim itself, Judge Bork agreed with the majority that the case should be remanded for rehearing and, indeed, opined that the claim might properly be remedied on remand under the Fifth Amendment.

Judge Bork's attackers have also repeatedly cited his opinion in the sexual harassment case of Vinson v. Taylor, 760 F.2d

(Footnote Continued)

II. JUDGE BORK'S VIEWS AND TESTIMONY REGARDING GENDER DISCRIMINATION AND THE EQUAL PROTECTION CLAUSE

The majority report repeats -- prominently -- a canard as widespread in anti-Bork circles as it is untrue, "Prior to the hearings, Judge Bork did not include women within the coverage of the equal protection clause." (Majority Report, p. 45.)

In fact, Judge Bork's position has been consistent. He has never questioned that the equal protection clause applies to women.[2] Judge Bork has differed with those who say that when applying the equal protection clause we must scrutinize the claims of different groups differently. He does so specifically because groups such as women might get a lesser standard of protection. As he put it in his testimony, "This group-by-group approach, in which some groups get really no protection because they call it 'rationality' . . . is wrong." (Tr., Sept. 18, p. 196.) "Women would not be covered," Judge Bork said, "if you are talking about discrete and insular minorities. But I think this group-by-group approach . . . is really intellectually incoherent." (Id.,

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(Footnote Continued)
1330 (1985), cert. denied, 474 U.S. 815 (1985), as evidence of his hostility to women's rights. This reliance is equally unjustified. Once again, the issues on which Judge Bork differed with the majority were not tests of attitudes towards women's rights. The Supreme Court later adopted part of Judge Bork's dissent, which concerned employer liability in cases where the employer had taken appropriate steps to prevent harassment. The other part of the dissent was over whether a person accused of harassment had the right to introduce evidence that the transaction was voluntary.

2 Our paper, "The Alleged Confirmation Conversions," contains a more extended discussion of this charge.

p. 195.) "If you do not do it by groups," he said, "then everybody is included." (Tr., Sept. 17, p. 134.)[3]

Thus Judge Bork's view of the Fourteenth Amendment would include all people, including women. It is hard to imagine clearer statements than these or ones that the majority staff has more obligation to cite and take into account.

III. JUDGE BORK'S "REASONABLE BASIS" TEST

The majority report attempts to obscure Judge Bork's clear testimony that the equal protection clause applies to gender discrimination, and that therefore he would arrive at virtually the same conclusions in this area as the Supreme Court has done so far. The report does this by arguing that the "reasonable basis" test which Judge Bork would use to deal with gender discrimination cases raises a standard that would not adequately protect women. The majority report raises the following objections: (1) the test has been used in the past to uphold discriminatory legislation (Majority Report, p. 47); (2) it defers to improper statistical generalizations (Id. at 48); and (3) it is "markedly different" from the test used by Justice Stevens (Id. at 48-49). These objections ignore the facts and are based upon selective, out-of-context quotations.

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[3] Judge Bork has clearly stated that if courts insist on following this group-by-group analytic approach with which he does not agree, then racial groups and ethnic groups will be the ones singled out for special scrutiny, because they are the groups that the Fourteenth Amendment was specifically intended to benefit.

A. The Standard of Protection Raised by Judge Bork's "Reasonable Basis" Test Differs Markedly from the "Rational Basis" Test Used in the Past to Uphold Discriminatory Legislation

The majority report, following its all-too-usual practice, simply ignores Judge Bork's statement that the "reasonable basis" approach espoused by both himself and Justice Stevens is not the same as the too-deferential "rational basis" approach used in the past to uphold discriminatory legislation.[4] See, e.g., Tr., Sept. 17, p. 141 (Sen. DeConcini: "I gathered . . . that your reasonable standard on cases involving sex discrimination . . . was similar to the rational basis.[5] That is not the case?" Judge Bork: "No, no it is not.") and p. 143 ("[Justice Rehnquist] is using rational basis as the third and lowest level of scrutiny in these tiers. I am not even in that game, and neither is Justice Stevens.").

The majority report uses a similarity in labels to imply, falsely, a similarity in substance. Regardless of what label is

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4 In the group-by-group approach, the degree of scrutiny to be applied has been described as falling into three or more "tiers", the lowest of which was sometimes called the "rational basis test." Courts desiring to reject a claimed denial of equal protection often applied this standard to the claimant's "group" and found that there was a "rational basis" for the allegedly offending legislation.

5 To complicate matters even further, Justice Stevens labels his test (which is identical to Judge Bork's "reasonable basis" test) as a "rational basis" test. The substance of Justice Stevens' test, as the majority report implicitly concedes (p. 49), is very different from the "rational basis" test used as the lowest level of the three-tier scrutiny employed in the group-by-group approach.

used, Judge Bork's testimony makes clear his view that legislative distinctions based upon gender would almost never be reasonable and, hence, almost never Constitutional:

> The kinds of distinctions between men and women that are now allowable . . . [a]re almost entirely based upon biological differences and there are only a few things in life as to which a biological difference makes a difference.

Tr., Sept. 17, p. 142.

B. The Majority Report Blatantly Misrepresents Judge Bork's Views on the Use of Statistics

The majority report thinks it makes a telling point by commenting on Judge Bork's testimony regarding Craig v. Boren, 429 U.S. 190 (1976), where the Court struck down an Oklahoma statute that allowed women to obtain beer at age 18 but did not allow men to do so until they were 21. "According to Judge Bork," says the report, "sex-based treatment should have been allowed because it rested upon a generalization supported by statistics." (Majority Report, p. 48.) In support, the report quotes Judge Bork's committee testimony about Craig in which he said that the law "probably is justified because they have statistics . . . they had evidence that there was a problem with young men drinking more than there was with young women drinking." (Tr., Sept. 17, p. 135.)

This presentation is a gross distortion of Judge Bork's testimony. Immediately following the statement about statistics quoted in the majority report, Judge Bork said, "Now, I do not know if the evidence was good. You would have to examine it." (Id.)

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"The question," he went on to say, "is whether there is a reasonable basis for having a differential drinking age. . . . Now, maybe there is; maybe there isn't." (Id. at 136.) And when pressed by Sen. DeConcini, who asked if he had an opinion of the result reached in Craig, Judge Bork replied: "No. I would have to look at the evidence in the case. They got into some statistics. Statisticians tell me they didn't handle the statistics very well." (Id.) Thus the attempt by the majority to depict Judge Bork as blindly accepting overbroad statistical generalization is undermined by his testimony in the very colloquy they quote.

The majority report goes on to quote without qualification several professors to the effect that generalized statistics are never proper justification for laws distinguishing between men and women. This proposition is extremely misleading. Statistics is just one among many kinds of evidence that can be (and frequently are) used to attack or support any law. The report's blanket criticism of the use of statistics, if it had been followed by the courts, would have prevented many court decisions upholding the rights of women and other minorities. Most recently, for example, in an opinion this year by Justice Brennan in Johnson v. Transportation Agency, Santa Clara County, California, ___ U.S. ___, 107 S. Ct. 1442 (1987), the Court, on the basis of statistics demonstrating that women were underrepresented in a government agency, upheld an affirmative action plan to correct that underrepresentation.

C. Judge Bork Has Adopted Justice Stevens' Equal Protection Analysis

During the hearings, and subsequently, Judge Bork told the Committee that he had adopted the equal protection analysis of Justice Stevens. See, e.g., Bork Letter to Biden, October 1, 1987, pp. 3-4.

Justice Stevens has taken the unprecedented step of publicly supporting Judge Bork's nomination. But without a single citation to any case decided by Judge Bork or, indeed, any statement he has ever made, the majority presumes to conclude, contrary to Judge Bork's sworn testimony, that he really doesn't agree with Justice Stevens.

In order to manufacture this supposed conflict, the report chooses to present Judge Bork's position not by quoting Judge Bork but by quoting one anti-Bork professor's characterization of Judge Bork's position. This professor misrepresents Judge Bork as "simply asking whether the government has the 'statistics' to justify the accuracy of a generalization." (Majority Report, p. 49.) And the majority mischaracterizes Justice Stevens' position as well by ignoring the Justice's specific disavowal of the multitiered equal protection test in Craig v. Boren, supra:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.

429 U.S. at 211-212.

Justice Stevens' statement of his view of the equal protection clause in Craig is exactly the view expressly adopted by Judge Bork in his Committee testimony.

In a final attempt to distance Justice Stevens from Judge Bork, the majority report invokes the Justice's concurring opinion in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). After quoting the Justice's definition of the term "rational basis" (which, despite the report's bald assertion to the contrary, is not at all inconsistent with Judge Bork's formulation), the report claims that Justice Stevens expresses "an even more demanding requirement . . . whether 'a member of [the] class of persons' disadvantaged by the challenged law would [view the law as rational and thereby immune from attack on equal protection grounds]." (Majority Report, p. 49.) The page cite for this quotation is inaccurate and the quoted phrase, in the only place it appears, is used as an "a fortiori" illustration, not as any indication that Justice Stevens would be so absurd as to take the position that the rationality of a statute can be judged simply by the views of the people who are challenging it.

IV. JUDGE BORK'S EQUAL PROTECTION VIEWS ARE CONSISTENT WITH HIS OVERALL JUDICIAL PHILOSOPHY

The majority disingenuously assails Judge Bork on the ground that his "reasonable basis" test is inconsistent with his general philosophy of judicial restraint. (Majority Report, p. 50.) In that regard, the majority quotes Professor Gewirtz as

to what an "originalist" ought to think and, in contrast, why a "reasonable basis" test would be vague and require a judge to incorporate his personal preferences.

The Fourteenth Amendment states that no "person" shall be denied "the equal protection of the laws." Upon questioning from Chairman Biden, Judge Bork quoted from two of the amendment's framers, Congressman Bingham and Sen. Howard, supporting the view that the Fourteenth Amendment should be applied to all people. (Tr., Sept. 18, pp. 196-197.) The inclusion of all people under the equal protection clause is perfectly consistent with the language and history of the Fourteenth Amendment, and thus with an "originalist" philosophy.

Moreover, it seems absurd to contend that a "reasonable basis" test with teeth is somehow less workable and more prone to judicial manipulation than a three-tiered test with only a few groups specifically relegated to one or another tier (the rest being categorized as they come in), and with each tier requiring a different and distinct analysis of both the legislative goal being implemented and the connection between the law passed and the legislative goal. Indeed, Chairman Biden himself said, "[Equal Protection analysis] is so subjective . . . you are not applying all cases by the same rule." (Tr., Sept. 18, p. 195.) See also, Note, Justice Stevens' Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146 & n.1 (1987), noting that the "multitiered" approach has "come under considerable attack," and arguing that Justice Stevens' "rational basis" approach is preferable and more coherent.

CONCLUSION

Whatever the motivations of Judge Bork's accusers, their purpose cannot be to present an accurate picture of his views regarding women's rights. To the extent that Judge Bork has written or spoken on matters pertaining to those rights -- as a legal scholar, Solicitor General, Court of Appeals judge, or Supreme Court nominee -- he has expressed well reasoned and mainstream views affirming that the rights of women should be and are protected by the law. These views do not come close to justifying the present attempt in the majority report to portray him as a reactionary maverick.

JUDGE BORK AND FREE SPEECH

(Reply to Majority Report, pp. 50-57)

The majority report of the Senate Judiciary Committee devotes seven pages to a discussion of Judge Bork's position on the freedom of speech and press guaranteed by the First Amendment (Majority Report, pp. 50-57) without including a single word about Judge Bork's extensive and impressive record in First Amendment cases as a Circuit Judge over the past five years. Instead of addressing that substantial body of case law, it chooses to focus on a law review article that Judge Bork wrote over fifteen years ago in 1971.

While it is entirely proper for the Senate to consider Judge Bork's extra-judicial writings and comments, the purported concern with the 1971 article to the exclusion of his judicial record is curious, particularly in light of the full consideration the article received when Judge Bork was confirmed by the Senate as Solicitor General in 1973 and again as a Circuit Court Judge in 1982. Moreover, a fair reading of the 1971 article, especially in view of Judge Bork's subsequent writings, his judicial record, and his testimony before the committee fails to provide support for the majority report's assertion that Judge Bork is insensitive to the First Amendment.

I. JUDGE BORK'S RECORD ON THE COURT OF APPEALS

Judge Bork's record on the Court of Appeals, particularly his opinions in libel actions and in cases involving government regulation of speech, clearly reflects his determination to defend

and expand the freedoms guaranteed by the First Amendment. Yet these opinions are studiously ignored by the report -- not only in the section dealing with the First Amendment but also in the separate section which purports to assess Judge Bork's performance on the Court of Appeals. (Majority Report, pp. 50-51, 84-93).

A. Defamation Cases

It has been widely recognized that the greatest threat to First Amendment freedoms at the present time may lie in the vulnerability of the media to defamation actions. It is in this critical area that Judge Bork has made a major contribution to First Amendment values -- a contribution that would remain unknown to anyone who read only the report.

In McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460, 1466 (1983), aff'd in part and rev'd in part, 800 F.2d 1208 (1986), Judge Bork's opinion for a unanimous court stated: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship."

Judge Bork's observation in McBride foreshadowed an even more significant opinion in the following year in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985), where the Court of Appeals, sitting en banc, dismissed a libel action against columnists Evans and Novak. In that case, Judge Bork wrote a concurring opinion which was joined by three other judges and which, in the view of many commentators, overshadowed

the opinion of the court. In his opinion, Judge Bork eloquently described values central to the First Amendment:

> Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is, if the opinion and editorial pages of the public press were modeled on The Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate.

Id. at 993.

Judge Bork further stressed that the First Amendment must undergo a continuing evolution:

> In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

Id. at 995.

Judge Bork concluded that the Constitutional protection afforded statements of opinion must be extended to assertions of fact which could be fairly characterized as "hyperbole." Such a conclusion was, in his view, essential to the protection of First Amendment freedom.

Judge Bork's concurrence in Ollman was hailed by such advocates of press freedom as Anthony Lewis (describing the opinion as "extraordinarily thoughtful") and libel lawyer Bruce

Sanford ("There hasn't been an opinion more favorable to the press in a decade.").

B. Government Regulation of Speech

Judge Bork's protection of free speech in the context of defamation actions is complemented by his opinions protecting free speech from government regulation. For example, in Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984), Judge Bork participated in the reversal of a District Court decision and held that the Transit Authority had violated the First Amendment in refusing to lease advertising space for a poster critical of President Reagan. In FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985), Judge Bork voted to vacate as overly broad an injunction directed against commercial advertising.

Judge Bork has also emphasized the importance of First Amendment freedoms in cases involving governmental regulation of broadcasting. In this connection, it is significant that the prevailing law established by the Supreme Court gives broadcasters significantly less freedom than that afforded the print media. While scrupulously adhering to Supreme Court precedent, he has pointedly suggested the desirability of reconsideration of this distinction by the Supreme Court. See Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 319 (1987); Branch v. FCC, 824 F.2d 37 (D.C. Cir. 1984); Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983).

Only in narrowly defined circumstances has Judge Bork approved of government regulation that impinges on free speech. For example, in CCNV v. Watt, 703 F.2d 586 (D.C. Cir. 1983), rev'd, 468 U.S. 288 (1984), Judge Bork, in dissent, supported a Park Service regulation barring demonstrators from sleeping in tents across from the White House. In Clark v. CCNV, 468 U.S. 288 (1984), the Supreme Court upheld Judge Bork's position. In Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), cert. granted sub nom. Boos v. Barry, ___ U.S. ___, 107 S.Ct. 1282 (1987), Judge Bork writing for the court upheld the application of a law which barred the conduct of a demonstration within 500 feet of the Nicaraguan embassy.

II. JUDGE BORK'S 1971 LAW REVIEW ARTICLE

In 1971, Judge (then Professor) Bork wrote an article entitled "Neutral Principles and Some First Amendment Problems," 71 Ind. L.J. 1, in which he set forth, on a "tentative and exploratory" basis, a broad theory of Constitutional interpretation inspired by the work of Professor Herbert Wechsler. The latter part of the article undertook to illustrate the application of such principles to First Amendment law.

The report of the majority focuses upon two aspects of the article which it purports to find troubling: the extent to which the First Amendment protects (a) speech that advocates forcible overthrow of the government or violation of the law; and (b) speech that is non-political. With respect to both points, Judge Bork has substantially changed his position since 1971, in part as

a matter of simply accepting settled doctrine of the Supreme Court and in part as a matter of philosophy. It is important to understand that such changes are by no means unique to Judge Bork. The reports of the Supreme Court are full of split decisions which, once decided, have been faithfully applied by the full Court, including those who initially dissented. Moreover, there are instances in which Justices have abandoned positions which they had previously persuaded their colleagues to adopt.[1]

Nevertheless, the report insists upon viewing Judge Bork's changes of position with profound suspicion. As shown below, we are persuaded that a fair reading of the record shows that the majority's concerns, if genuine, are misplaced.

A. Speech Advocating Violence or Violation of the Law

In the 1971 article, Judge Bork criticized, on philosophical grounds, the "clear and present danger" doctrine and the decision in Brandenburg v. Ohio, 395 U.S. 444 (1969), which had reformulated, or supplanted, that test by holding that the First Amendment does not "permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy

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1 For example, in Miller v. California, 413 U.S. 15 (1973), Chief Justice Burger pointed out that "Mr. Justice Brennan, author of the opinions of the Court, or the plurality opinions, in Roth v. United States, supra; Jacobellis v. Ohio, supra; Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); and Memoirs v. Massachusetts, supra, has abandoned his former position and now maintains that no formulation of this Court, the Congress or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, Paris Adult Theatre I v. Slaton, post, p. 73 (Brennan, J., dissenting)." Id. at 26-27.

is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447. The particular speech held in Brandenburg to be protected occurred at a rally of the Ku Klux Klan; in the speech, references to a march on Washington and taking "revengeance" were accompanied by a variety of vivid racial epithets.

It seems perfectly reasonable to question, as a philosophical matter, whether the type of speech illustrated by Brandenburg has any political value. On the other hand, Judge Bork has since acknowledged the strength of the countervailing philosophical argument reflected by Brandenburg as well as the fact that Brandenburg is firmly embedded in the law of the land. He testified, repeatedly and unequivocally, that he had no interest in seeking to overturn Brandenburg.

Not satisfied with Judge Bork's acceptance of Brandenburg, the report attacks his lack of enthusiasm for two subsequent cases, Cohen v. California, 403 U.S. 15 (1971), and Hess v. Indiana, 414 U.S. 105 (1973). Both cases reversed convictions for disorderly conduct arising out of actions that involved, inter alia, the expression of obscenities. Contrary to the assertions of the report (Majority Report, p. 54), the decision in Cohen was not unanimous. Unaccountably, the report overlooked the dissent by Justice Blackmun, joined by Chief Justice Burger and Justice Black, which observed that under the circumstances, "the Court's agonizing over First Amendment values seemed misplaced and unnecessary." 403 U.S. at 27. In Hess v. Indiana, a dissent by Justice Rehnquist was joined by Justice Blackmun and Chief Justice

Burger. One may agree or disagree as to the result in Cohen or Hess (or the significance of the obscenity in each), but surely neither decision is, as the report would suggest, beyond debate.

B. Non-Political Speech

In the 1971 article, Judge Bork suggested that since the First Amendment was intended to protect speech that is explicitly political, the scope of its application might be similarly limited. As he pointed out in his testimony before the committee, great scholars of the First Amendment, such as Kalven and Meicklejohn, "all start with political speech as the core of the amendment." (Tr., Sept. 16, pp. 112-113.) See also Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Brennan, J., citing a letter of the Continental Congress).

Nevertheless, the subsequent writings of Judge Bork, as well as his testimony before the Committee, make it clear that Judge Bork has long since concluded that the First Amendment protects a full range of non-political expression. Such protected expression might be moral, scientific, literary or artistic, so long as it did not sink to the level of obscenity. (See, e.g., Tr., Sept. 16, pp. 110-114; Tr., Sept. 17, pp. 16-25.) The majority, however, professes concern that Judge Bork might still leave unprotected some legitimate forms of expression. Specifically, the Committee refers to a 1985 interview in which Judge Bork

expressed doubt that the Framers of the Constitution "intended to protect some forms of dancing from regulation." From this, the report leaps to the startling and unwarranted conclusion that, in Judge Bork's view:

> A Rubens painting could not be hung in a museum if the city counsel chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe.

Majority Report, p. 56.

That issue was squarely presented to Judge Bork at the hearing and squarely answered. He explained that, in his reference to "some forms of dancing," he specifically had in mind a Supreme Court decision which was concerned with "whether a community could ban dancing in the nude in a bar." (Tr., Sept. 17, p. 19.) He pointed out that the Court had upheld the ban only on the basis of the constitutional authority of the state to regulate sales of liquor. In Judge Bork's view, the same result could have been reached more directly without offense to the First Amendment. Id. See California v. La Rue, 409 U.S. 109 (1972).

The report simply ignores Judge Bork's explanation, however, and insists on equating his views on "nude dancing in a bar" with the view that he might take of a Rubens painting or the Alvin Ailey Dance Troupe. The attempt is, on its face, absurd. See California v. La Rue, supra at 118 ("But we would poorly serve both the interest for which the State may validly seek vindication and the interest protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the

constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre").

It is Judge Bork's view -- and it has long been the view of the majority of the Supreme Court -- that the First Amendment does not protect obscenity. As the most casual observer of the Court is aware, the Court has had enormous difficulty in defining obscenity, and, thus, the ambit of speech protected by the First Amendment. The path of the Court in this area has been marked by twists and turns, abandonments of prior decisions and confessions of incoherence. It is entirely possible that Judge Bork would define obscenity somewhat differently than the Court has defined it from time to time in the past or may from time to time in the future. However, the difference between Judge Bork and the majority of the Court, if any, is likely to be rather modest -- certainly in comparison with the wide difference between the Court's position and the view of Justice Brennan (i.e., that obscenity simply cannot be defined and that, therefore, at least in the case of consenting adults, it can never be prohibited). See Pope v. Illinois, 55 U.S.L.W. 4595, 4598 (May 4, 1987).

In no area do Judge Bork's opinions show a sharp divergence from the Court's current First Amendment positions. But to argue for his appointment to the Court on this basis leaves us apprehensive. If strict adherence to the perceived current doctrines of the Supreme Court is to be the litmus test for future nominees, what might become of a nominee who happened to subscribe to a minority position, such as that of Justice Brennan on obscenity, or to a nominee who once held such minority views?

In insisting on a rigid application of this criterion, Judge Bork's opponents are creating a dangerous precedent. Still, even if we measure Judge Bork by the standard that his critics have created, his performance in no sense justifies the unreasoned hostility that pervades the Judiciary Committee's majority report.

The same is true in other areas of First Amendment jurisprudence. Judge Bork's respect for these guarantees and their defense is profound. It is disheartening to see that the committee majority refuses to discuss his views with any seriousness.

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JUDGE BORK AND EXECUTIVE POWER

(Reply to Majority Report, pp. 57-65)

INTRODUCTION

The majority report charges Judge Bork with both undue deference to Congress (in recognition of individual rights) and excessive subservience to the executive branch. The majority report bases its views on several particular areas. Nothing in all of Judge Bork's writings or testimony supports such a view in general or in these particular areas.

To the contrary, Judge Bork has consistently recognized the coordinate powers of all of the branches of government and the supremacy of each of those branches in the area of governances allocated to it by the Constitution.

I. THE MAJORITY REPORT MISSTATES JUDGE BORK'S POSITION BY CHARGING THAT HE EXPRESSES AN "EXCEEDINGLY BROAD VIEW" OF PRESIDENTIAL POWER IN THE REALM OF WAR POWERS

Judge Bork's various writings, opinions and testimony make clear that his philosophy of the allocation of war-making powers favors neither the executive nor the legislative branch of government. Indeed, his aim has consistently been to strike the constitutionally mandated balance between the two branches.

Judge Bork has succinctly stated this general view of the constitutional division of war powers between the executive and legislative branches:

> The constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach

> the tactical and managerial are for the President, while the major questions of war and peace are, in last analysis, confined to Congress.

Bork, Comments on Legality of U.S. Action in Cambodia, 65 Am. J. Int'l L. 79-81 (1971).

A more recent expression of Judge Bork's views on the sharing of the war powers shows a keen awareness of the decisive role of the legislature in this area. As a law professor, Judge Bork stated in testimony on a bill to regulate foreign intelligence activities:

> Congress clearly has the constitutional power to declare war or refuse to declare war. It also has the power to appropriate funds for armed conflict or refuse to do so. Congress has, in fact, the raw constitutional power to disband the Armed Forces altogether and leave the President as Commander in Chief in name only, without a single platoon to maneuver.

National Intelligence Reform and Reorganization Act, Hearings before the Senate Select Subcommittee on Intelligence, 95th Cong., 2d Sess. 459 (1978).

Despite this clear recognition of congressional power by Judge Bork, the majority report reaches the extraordinary conclusion that Judge Bork shows excessive deference to the executive. The report does so based on two very thin reeds. First, the committee welcomed the testimony of ex-Senator Eagleton that "Judge Bork . . . forgets that the Founding Fathers deliberately decided that matters relating to war and the use of American military forces are shared powers . . . ." (Eagleton statement, Comm. Print Draft, Vol. 3, at 1308) -- a charge clearly contradicted by Judge Bork's record on the issue.

Second, the report relies upon the testimony of University of Chicago Professor Cass Sunstein. Yet even as the Professor attempted to portray Judge Bork as unduly subservient to the executive, he was forced to concede that "[t]he constitutional issue is not a simple one, and Judge Bork is correct in pointing to the President's power to make tactical decisions during a war." (Sunstein Statement, Comm. Print Draft, Vol. 3, at 1334; emphasis added.) Professor Sunstein repeated his acknowledgment elsewhere in his testimony: "[i]n some circumstances, Judge Bork's position is probably correct; tactical judgments may enable the President to extend a war into other nations." (Sunstein statement, Comm. Print Draft, Vol. 3, at 1330; emphasis added.)

The report had to rely on such poor evidence because the report's conclusion is faulty. Judge Bork's view of the allocation of war powers is in reality an uncontroversial application of the constitutional division of war powers, not one idiosyncratically skewed in favor of the executive as the report would have one believe.

The report's real quarrel is not with Judge Bork's general view of the constitutional alignment of war powers but with his position on the recent attempt of the War Powers Act to circumscribe what had theretofore been clear executive prerogative. On this ground, though, Judge Bork hardly stands alone. He has stated that the War Powers Resolution taken as a whole "is probably unconstitutional and certainly unworkable." But no less a Constitutional authority than Senator Sam Ervin has expressed the same view in almost the same words. During the debate on the War

Powers Act, Senator Ervin stated that "[t]he bill is not only unconstitutional, but it is also impractical of operation. In short, it is an absurdity." He added:

> [I think] that the Founding Fathers were acting in great wisdom when they separated the powers of Government by making one public official, the President of the United States, the Commander in Chief of the Army and Navy of the United States, rather than 100 Senators and 435 Representatives.

Spong, The War Powers Resolution Revisited: Historic Accomplishment or Surrender?, 16 Wm. & Mary L. Rev. 823, 842-43 (1975).

The debate over the War Powers Act remains a lively one. But the report uses a widely shared position in that debate to try to make Judge Bork sound like an extremist on general separation of powers issues, "well outside of the mainstream of legal thought." (Majority Report, p. 57; emphasis added.) This attempt is disreputable.

II. THERE IS WIDESPREAD SUPPORT FOR JUDGE BORK'S POSITION ON THE LIMITATION OF INTELLIGENCE ACTIVITIES

In another flawed attempt to place Judge Bork outside of the mainstream of legal thought, the report charges that his views on Congress's power to restrict intelligence actions are "exceedingly narrow," "extreme" and "quite troubling." (Id. at 59, 61.) In light of the serious nature of these charges, one would have expected the report to cite a body of respectable evidence. Once more the report's polemic is more than its proof.

As the single support for its assertion, the report relies yet again upon Professor Sunstein. In commenting on Judge

Bork's view that serious constitutional questions arise from the requirement of the Foreign Intelligence Surveillance Act that a warrant be obtained before surveillance of the activities of foreign powers, Professor Sunstein stated that "[t]he President has no 'inherent' authority, in the face of a congressional judgment to the contrary, to engage in surveillance activities." (Comm. Print Draft, Vol. 3, at 1331-1332).[1] For its own part, the report puts it, "Congress simply must have the power to oversee and ultimately to control the ability of the Executive Branch to conduct intelligence operations." (Majority Report, pp. 60-61.) In the almost total absence of supporting evidence or authority, such a statement reminds one inescapably of a toddler stamping its foot.

There is in fact authority on these questions in the form of prior court opinions. Justice Powell in United States v. United States District Court, 407 U.S. 297 (1972), addressed the precise point of presidential power raised by Professor Sunstein and came to a dramatically different conclusion:

> We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, §1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful

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1 Elsewhere Prof. Sunstein did not seem so sure. He conceded "[w]hether the President has the power to engage in surveillance without congressional authorization is itself a disputed and difficult question." (Id.; emphasis added.) Professor Sunstein nevertheless showed no embarrassment at characterizing Judge Bork's views as "extremely adventurous and indeed quite curious." (Majority Report p. 60.)

> means. In the discharge of this duty, the President -- through the Attorney General -- may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.

407 U.S. at 310.

In this opinion Justice Powell expressly declined to limit the President's power in the area that Judge Bork had considered problematic, the Foreign Intelligence Surveillance Act and its warrant requirement with respect to the activities of foreign states:

> Further, the instant case requires no judgement on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country.

407 U.S. at 308.

So concerned was Justice Powell not to have the Court's opinion taken as a limitation of the President's power to conduct foreign surveillance that he reiterated the point:

> We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.

407 U.S. at 321-322.

Surely if Congress's supremacy in this area were a universally acknowledged fact, and certainly if any other view

were simply "idiosyncratic" or "without precedent,"[2] Justice Powell would not have been so concerned to leave the question open. Justice Powell's caution in this regard contrasts with the recklessness with which the report deals with the very same questions, for there is nothing in Judge Bork's views of the President's surveillance powers that even remotely justifies the nature of the attack leveled against him.[3]

III. JUDGE BORK'S VIEWS ON CONGRESSIONAL STANDING TO SUE ARE NOT NOVEL

Congressional standing is a doctrine that would permit members of Congress to go into court and obtain a judicial determination of the scope of their power vis-a-vis the other departments of government (executive and judicial) even in situations where no citizen's life, liberty or property is threatened by government action. Judge Bork opposes this doctrine, believing with Chief Justice Marshall in Marbury v. Madison that the Court's legitimate authority to review the constitutionality of actions of the other branches of government derives from and is limited to its Article II responsibility to resolve "cases and controversies." Judge Bork's position on Congressional standing could more fairly be characterized as one on institutional standing:

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[2] Two other examples of Professor Sunstein's level of characterization. (Comm. Print Draft, Vol. 3, at 1331-1332.)

[3] This conclusion is particularly compelling when it is considered that both the Third and Fifth Circuits share Judge Bork's view that warrantless searches of foreign powers are constitutionally permissible. United States v. Butenko, 494 F.2d 593 (3rd Cir.), cert. denied, 419 U.S. 881 (1974); United States v. Clay, 430 F.2d 165 (5th Cir. 1970).

Absent a genuine case or controversy, no branch of government should invoke the judicial process to vindicate its view of its own constitutional authority vis-a-vis the other branches.

In the long history of constitutional adjudication from the founding of the republic to the present day, no Supreme Court case -- not one -- has ever recognized such a sweeping extension of judicial power as this doctrine envisions, power unhinged from a real law where someone's legal rights are at risk. Of the lower federal courts, only one of the eleven circuit courts of appeal has adopted this view of judicial power -- the District of Columbia Court of Appeals, over the dissents of Judge Bork and Judge (now Justice) Scalia. So aberrant is the D.C. court's view that Judge Bork's dissent in Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) is editorially described as "strong" in a constitutional law casebook used in leading law schools throughout the United States. (Gunther, Constitutional Law, 1987 Supp. 73 n.1.) Even responsible scholars who favor some limited recognition of Congressional standing admit that in this recondite area of law the Bork view is quite conventional, if insufficiently avant-garde for their taste.

It is against this background that we must assess the credibility of the committee majority's assertion that they find Judge Bork's view on Congressional standing "alarming." (Majority Report, p. 64.) The committee finds its sense of alarm fortified by the fact that Justice Powell once expressed himself in favor of Congressional standing in a sole concurring opinion in Goldwater v. Carter, 444 U.S. 996 (1979). (Would that the committee were

consistent in using Justice Powell's views as the touchstone of Judge Bork's location in the stream of American jurisprudence.) But to calm this alarm there is the fact that Justice Powell arrived at the same conclusion that Judge Bork would presumably have reached in Goldwater. Justice Powell declined to reach the merits of the case because he found the dispute unripe for judicial review.

IV. JUDGE BORK'S VIEW REGARDING EXECUTIVE PRIVILEGE IS CONSTITUTIONALLY BALANCED

In addition to being "alarmed" at Judge Bork's view of Congressional standing, the committee majority finds "troubling" his dissent in Wolfe v. HHS, 815 F.2d 1527 (1987). This was a Freedom of Information Act case in which Judge Bork disagreed with court-ordered disclosure of certain government documents. Believing the record incomplete, Judge Bork would have remanded the case to the District Court for a determination of whether the documents were the product of direct advice and assistance to the President by executive subordinates. His rationale was conventional: If candid advice is to be given in confidence to the President, then some privilege must attach to the giver of the advice as well as to the President who receives it. Judge Bork did not conclude that privilege existed or what its scope would be; he would have allowed the trial court to develop the relevant facts more fully than the majority required.

Judge Bork's position on privilege in the Wolfe case is not only reasonable in itself but in no way represents a preference for the executive branch of government. The same concept of privilege would apply to the legislative and judicial branches. As Judge Bork stated:

> Although the constitutional defense to FOIA disclosure here asserted by the government is referred to as an "executive privilege," nothing about the privilege is distinctly executive. Rather, the privilege is an attribute of the duties delegated to each of the branches by the Constitution. Neither Congress nor the courts, any more than the executive, could be constitutionally forced by a coordinate branch to reveal deliberations for which confidentiality is required. See supra note 3. The constitutional privilege in question is, therefore, more accurately viewed as a government-wide privilege of confidentiality for deliberative processes.

815 F.2d at 1538.

This neutrality, it should be noted, is parallel to the principle of neutrality governing Judge Bork's previously discussed view on Congressional standing.

V. JUDGE BORK HAS NEVER CATEGORICALLY DENIED THE CONSTITUTIONALITY OF SPECIAL PROSECUTOR OR INDEPENDENT COUNSEL LEGISLATION

In an attempt to cast doubt on whether Judge Bork would uphold the constitutionality of the current independent counsel provisions of the Ethics in Government Act, the Majority boldly asserts that "Judge Bork has said that special prosecutor legislation is unconstitutional." (Majority Report, p. 61.)

This blanket statement distorts Judge Bork's position on special prosecutor legislation and masks the reasons for his concern over certain forms of such legislation.

Judge Bork's objection to special prosecution legislation centers not, as the majority would have one believe, on judicial appointment of an independent special prosecutor, but rather on continuing judicial control over the prosecutor once an appointment is made. This strongly suggests that Judge Bork would not find objectionable independent counsel provisions like those found in the Ethics in Government Act, which vest the power to appoint independent counsel in the judiciary while leaving the power to direct and review the prosecution with the executive.

Judge Bork's opinions in two cases construing the Ethics in Government Act bear this out. In Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984), Judge Bork's concurring opinion upheld the constitutionality of the Act because it left with the executive the power to review the Attorney General's failure to conduct an investigation against high-level federal government officials accused of violating federal criminal laws. Similarly, in Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984)(en banc), Judge Bork joined a per curiam decision of the D.C. Circuit Court, upholding the constitutionality of the Act because it precluded judicial review of the Attorney General's decision not to investigate allegations of wrongdoing against high-ranking members of the federal government and not to seek appointment of independent counsel.

Others share Judge Bork's concern over the non-accountability of special prosecutors to the executive and are more critical of the Act. As Professor Kramer of the University of Minnesota Law School stated:

> One provision of the present Act, however, seems to render the Act unconstitutional, despite the argument for allowing courts to appoint special prosecutors: special prosecutors need not adhere to Department of Justice policy on criminal prosecutions. This provision confronts the Buckley Court's concern that the vesting of executive power outside of the executive branch would violate the separation of powers doctrine. The Act creates an executive office whose incumbent is neither appointed by the President nor the Attorney General. The appointee is also not obliged to follow established executive policy. This glaring absence of special prosecutor accountability seriously undermines the basic separation of powers doctrine; the President must be able to exercise some control over those performing executive functions. This arrangement clearly runs contrary to the trend, signalled in Buckley, of increased presidential authority to control prosecution. If one couples the absence of executive control over the appointment of the special prosecutor with this lack of accountability, the special prosecutor provisions arguably violate article II, section II, clause 2 of the Constitution.

Kramer, The Special Prosecution Act: Proposals for 1983, 66 Minn. L. Rev. 963, 979-980 (1982) (footnotes omitted).

In light of the above, the majority report's conclusion that Judge Bork's view on special prosecution legislation is "troubling" (Majority Report, p. 61), is indefensible.

EXECUTIVE POWER IN GENERAL

Examples of Judge Bork's independence when dealing with the executive interest are readily available from his record as Solicitor General. When criminal proceedings were contemplated

against then Vice President Agnew, Solicitor General Bork not only rejected arguments of immunity from prosecution but concluded, after reviewing the evidence, that an indictment was warranted. Former Attorney General Richardson viewed the Agnew case as a "substantially more difficult problem than anything [he] had had to deal with in Watergate." (Minority Report, p. 283.) The majority report ignores this evidence of independence and even courage in its one-sided portrait of Judge Bork's pro-executive bias. As Solicitor General, Judge Bork also prepared a lengthy analysis of presidential use of the pocket veto and concluded that it would be unconstitutional for President Ford to use it in any context other than that of Congress's final adjournment sine die. Bork's presentation carried the day with Attorney General Levi and the President. These are the actions of a thoughtful and even-handed constitutional scholar, not those of a man embedded with a predisposition to exalt the executive.

The majority report's survey of Judge Bork's views as they relate to executive power is an extreme example of Lloyd Cutler's vivid phrase "sifting the entrails." The majority canvasses the Judge's position in various disputes in which a particular type of litigant was involved, ignores the complexities and merits of each case, totes up the results, and concludes that the judge is biased in favor of the group that he thought right in a majority of instances. The majority report then finds Judge Bork guilty of pro-executive bias, pro-business bias, pro-government bias or anti-civil liberties bias.

This method of evaluation is mindless. Worse, it can have a pernicious effect on other judges, who may get the message that their chance for advancement in their profession depends on maintaining some sort of ratio of winners and losers among vociferous interest groups. Finally, once partisans start down this intellectually dishonest road it is nearly inevitable that they will slide into still other sorts of dishonesty in their evaluations. In painting its picture of Judge Bork's pro-executive bias, for instance, the majority report refuses even to enter into the balance the instances in which Robert Bork has taken official actions against the executive interest on major issues.

The truth is, Judge Bork -- as author, Solicitor General and judge -- has confronted issues involving the executive, as he has confronted other issues. He has proceeded fairly, thoughtfully, and with respect for law and precedent. He has found the executive sometimes in the right and sometimes in the wrong. This is what we can expect from a judge who deals with every problem on its merits and without preconceived biases. If we start to expect anything else, we put the integrity of this country's judicial system in significant danger.

One final irony deserves note. According to the report, Judge Bork, in a posture of unparalleled self-effacement, seeks the atrophy of the judiciary -- the very branch of government he now serves and the highest level of which he aspires to reach -- in favor of one of the other branches, the executive. As shown

above, this charge is not true. But if it were, Washington would have in Judge Bork a rare prize: a man who doesn't put himself first.

9

JUDGE BORK AND WATERGATE·

(Reply to Majority Report, pp. 65-71)

In 1982, the Senate Judiciary Committee thoroughly examined the role of Robert Bork as Acting Attorney General in 1973 when he discharged Archibald Cox as Special Prosecutor. The Committee then recommended his confirmation as a Judge of the Court of Appeals. In 1987, the Committee has traversed the same terrain, in painstaking detail, and has discovered no new evidence that would in any way support a different conclusion. To the contrary, all of the evidence reviewed resounds, as it has in the past, to Judge Bork's credit.

The majority report of the Judiciary Committee makes no claim of presenting any new evidence. Nevertheless, the report offers two assertions in support of its recommendation against Judge Bork: (a) that the discharge of Mr. Cox violated a Justice Department regulation (Majority Report, pp. 66-68); and (b) that Judge Bork's actions in 1973 revealed a "misunderstanding of the separation of powers." (Id. at pp. 68-71.) Both assertions are without substance.

The report's assertion that Judge Bork violated a Justice Departmental regulation in discharging Mr. Cox is immediately contradicted by two powerful facts: first, Mr. Cox himself testified in 1973 that the President had the authority to discharge him and that the defect in the procedure followed, if any, was "technical;" and second, the Judiciary Committee itself failed to find any "illegality" when it confirmed Judge Bork in 1982. In

fact, the majority report's position is based entirely upon a 1973 decision of a District Court that was subsequently vacated by the Court of Appeals as moot -- over the objection of Judge Bork who wanted the issue of legality decided by the Court of Appeals. Nader v. Bork, 366 F. Supp. 104 (1973), vacated, No. 74-1620 (D.C. Cir. Aug. 20 and Oct. 22, 1975). Having been vacated, the case is of no legal authority. (The report miscites United States v. Nixon, 418 U.S. 683 (1974), as "reaffirm[ing]" the "basic holding" of Nader. The legality of the Cox firing was not an issue in Nixon, and the quotation from Nixon appearing on page 67 of the report is simply a statement of hornbook law that does not resolve the issues in Nader.

But apart from its lack of legal status, the decision in Nader v. Bork reflected more of a political expression than a judicial analysis. The decision first concluded that Mr. Cox could not be discharged while the Departmental regulation establishing the Special Prosecutor's office remained extant. Confronted with the fact that the regulation had been rescinded three days later and made retroactive, the court made the sweeping and unsupportable assertion that the rescission of such a regulation was not valid since, in the court's view, it was "arbitrary and unreasonable." 366 F. Supp. at 109.

Passing the event of Mr. Cox's discharge, the majority report proceeds to a rather tortuous examination of various recollections of the succeeding few days in October 1973. After reviewing a purported "discrepancy" as to just which day during the week of October 21-26, 1973 Judge Bork had begun to search for

a new Special Prosecutor, the report lamely concludes that any such discrepancy "is most likely one of the understandably different recollections of timing regarding events of 14 years ago." (Majority Report, p. 70.)

Having failed to unearth any new facts, the report presents its principal point in a cloud of muddled rhetoric:

> In the committee's view, perhaps the most significant aspect regarding the firing of the Watergate Special Prosecutor is Judge Bork's immediate and continuing perception that an effective Watergate investigation could be run out of the same Department of Justice that had just carried out the task of firing Mr. Cox for seeking to run such an investigation. The degree of deference to executive authority and executive representations required to hold that perception is astonishing in the face of the abuses of executive authority represented by President Nixon's actions at the time.
>
> Institutionalized checks on unrestrained power constitute the very life of our Constitution and are an indispensible ingredient of our freedom. The great deference to executive power shown by the nominee in the actions related here, as well as in many of his other statements and judicial opinion, (see generally Part III, Section V, supra), seems inappropriate for a member of a Supreme Court, which is responsible for preserving the constitutional system of checks and balances.

Majority Report, pp. 70-71.

The foregoing attack on Judge Bork's "deference to executive power" misses two fundamental points: First, the Special Prosecutor was clearly a part of the executive branch and thus no separation of powers issue was involved. Second, and even more important as a practical matter, Judge Bork was also very much a part of the executive branch and directly responsible to

the President. As such, he had no authority to appoint a special Prosecutor unless and until the President was persuaded that such a course was correct.

The record is clear that Judge Bork urged the President to appoint a new Special Prosecutor.* In the meantime, during the brief period prior to the decision of the President, Judge Bork's responsibility was to maintain the Special Prosecutor Force intact and to ensure that its work continued. Judge Bork's effectiveness in that crucial task was made clear by the report of Special Prosecutor Leon Jaworski:

> The "Saturday Night Massacre" did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Peterson, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House.

In short, the record shows that, at a time of national crisis and great personal stress, Judge Bork acted in a manner that reflected sound judgment and high integrity. Few nominees in the history of the Supreme Court can lay claim to having faced and passed a comparable test.

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* An affidavit of Leonard Garment, a member of the Committee for a Fair Confirmation Process, is annexed to this paper; it presents further details of Judge Bork's efforts to obtain a replacement Special Prosecutor from outside the government at the earliest possible time.

AFFIDAVIT OF LEONARD GARMENT

1. I am an attorney, licensed to practice in the District of Columbia and in New York; I am a member of the Committee For a Fair Confirmation Process.

2. On October 20, 1973, the day of the so-called "Saturday Night Massacre," I was asked by General Alexander Haig, White House Chief of Staff, to go to the Department of Justice with Fred J. Buzhardt, to bring the Solicitor General, Robert H. Bork, to the White House to discuss his appointment as Acting Attorney General, following the resignations of the Attorney General, Elliot Richardson, and the Deputy Attorney General, William Ruckelshaus. At the time, I was Acting Counsel to the President, and Mr. Buzhardt was Special Counsel to the President for Watergate matters. In the course of our return to the White House, Mr. Bork said, in substance, that he was unhappy about the role into which he had been thrust but had concluded, on the basis of his conversations with Messrs. Richardson and Ruckelshaus, that it was necessary that he undertake the temporary assignment in order to maintain continuity in the essential operations of the Department and to prevent the destruction of morale. Mr. Bork added, again in substance, that there would have to be another Special Prosecutor, that he did not believe he would last very long in his new assignment because he had no intention to interfere with the work of the present staff of the Special Prosecutor, and its effort to obtain necessary evidence, including tapes, and he questioned whether this would be acceptable to the

President. Mr. Buzhardt and I said we would help in any way we could.

3. On Tuesday, October 22, I discussed with Mr. Bork two, among other, subjects: First, we agreed upon the need for the prompt appointment of a new Special Prosecutor; and secondly, we began discussing names of certain attorneys qualified to succeed Mr. Cox.

4. On Wednesday morning at a meeting in my office at the White House attended by Mr. Bork and Bryce Harlow, Counselor to the President (and, I believe, Mr. Buzhardt), all of us agreed that it was essential that a new Special Prosecutor be appointed as soon as possible. This recommendation was incorporated in a memorandum to the President (via General Haig). My notes indicate that Mr. Bork went next door to Professor Charles Alan Wright's office to type this memorandum. I sent it with a covering note to the West Wing. The President announced his decision to appoint a new Special Prosecutor at his press conference on Friday, October 26.

LEONARD GARMENT

Dated: 11-2-87

Subscribed and sworn to before me this 2nd day of _____, 1987.

NOTARY PUBLIC

My commission expires: _____

10

JUDGE BORK AND ANTITRUST

(Reply to Majority Report, pages 71-78)

Judge Robert H. Bork is undeniably a leading figure in the antitrust area. For years a distinguished professor of antitrust law, he has written many influential studies in the field including the seminal analysis The Antitrust Paradox. This book has been cited with approval, as was pointed out to the committee, by every currently sitting Justice of the Supreme Court.

One can take issue with Judge Bork's view that the operation of the free market rather than the intervention of economic regulators better serves the interests of the consumer and the goals of the antitrust laws -- some scholars do, though Judge Bork's views are in the majority these days. This does not gainsay the fact that if competence in the antitrust area were the sole basis for selecting a judicial appointee, it would be difficult to imagine a nominee more qualified than Judge Bork.

The report of the Committee on the Judiciary does not content itself with simply going on record as supportive of antitrust theories which disagree with Judge Bork's view. That would have been the forthright thing to do. Instead the committee sets out to portray Judge Bork as a caricature of a robber baron, supportive of monopolists preying on helpless consumers. To this end the report uses a variety of sophomoric debating tricks and outright misrepresentations. The result is a shabby performance which brings discredit to the U.S. Senate.

It takes twice as long to expose a misrepresentation as it does to make one. However, to see what the majority has done we do not need to conduct a line-by-line review of the report's treatment of the antitrust issue. A few examples will suffice to show what a deceitful performance this is.

The report charges that in the antitrust field Judge Bork, contrary to his reputation as a proponent of judicial restraint, "interprets Congressional will selectively to suit his own agenda." (Majority Report, p. 77.) The committee chairman thinks he has done something clever by labeling this alleged phenomenon "the Bork Paradox." This is worse than a cheap shot; it is an intellectually dishonest one.

The only support offered for this canard is a quotation which the report misleadingly takes out of context and dishonestly edits to turn its meaning around by 180 degrees. The report quotes from a discussion by Judge Bork in Paradox of the Clayton Act and the Robinson-Patman Act, which forbid mergers and pricing differentials when the effect of such activity "may be substantially to lessen competition." In his discussion Judge Bork criticized the situation in which Congress had presumed an anticompetitive tendency in two specific areas and directed the courts to hold such circumstances unlawful when there was, in fact, no anticompetitive result. Judge Bork's view was that the activities in question did not injure competition and "hence are not illegal under the laws as written." This view, in turn, led him to observe that courts "ought not accept delegations to make

rules unrelated to reality." (Majority Report, pp. 76-77, quoting from R. Bork, The Antitrust Paradox, 410 (1978).)

But in quoting this passage, the report edits out a crucial sentence: "They [the courts] can accept arbitrary or even pernicious rules from the legislature." (Id.), and the report simply stops quoting before reaching the final sentences of this paragraph, in which Judge Bork wrote, in terms which completely give the lie to the report's accusation,

> Congress may think our judgment wrong, or it may have other reasons to outlaw certain of the practices involved. Should it enact a law describing what is to be outlawed with some particularity, or enunciating criteria that we are capable of applying, we will of course enforce that law.

Id.at 411; emphasis added.

The report tries to use the foregoing passage to discredit Judge Bork. In the hearings, Judge Bork testified that "I am out there to follow Congress's intentions," which the majority report tried to portray as a "dramatic change" (Majority Report, p. 76) from his prior writing in Paradox. The report bases this accusation on a misquotation that is not only false but -- one cannot avoid the conclusion -- deliberately so.

Next, with no basis whatever, the report portrays Judge Bork as supportive of monopoly profits at the expense of the average consumer. Faced with Judge Bork's often-expressed view that the antitrust is "[a] consumer-oriented law" (Paradox at 7), the report purports to "interpret" what Judge Bork means in a way which turns his entire philosophy on its ear. The report says

> As used by Judge Bork, it [consumer welfare] really has little to do with the more commonly understood definition -- that is, the unfair acquisition of consumers' wealth by firms with market power. Higher prices to consumers are not troublesome to Judge Bork as long as the monopolistic business produces efficiently.

Majority Report, pp. 71-72.

The above is so incoherent as to defy analysis. Not surprisingly, no support is offered for this assertion that Judge Bork means the opposite of what he says he means.

Similarly, the report makes the accusation that "Judge Bork would not prevent a handful of 'mega-corporations' from developing." (Id. at 74.) Here again, no authority or argument is offered to support the charge. More reprehensibly, the point is deceptively hedged. A note says the charge is based on Judge Bork's view "that the antitrust laws should not be applied to conglomerate mergers." (Id.; emphasis added.) But Judge Bork has explicitly said that conglomerate mergers are properly the subject of law, even if not the antitrust laws. In other words, he has said most emphatically that he does is not mindlessly favor "mega-corporations" in any unqualified sense, in direct contradiction to what the report says. His view was set out in Paradox as follows:

> There exists a vast literature about conglomerate mergers. Much of it has to do with their effect onthe overall concentration of the American economy, the tax incentives that propel them, the conglomerateur's propensity to issue weird and perhaps misleading securities, the difficulties ofapplying accounting principles to determine aconglomerate's real profitability, and many othermatters. Of these issues I will have little or, more accurately, nothing to say. They all raiseinteresting and important questions, and on

> some of them the evidence is not yet in. But they have one thing in common. They are not antitrust issues. Antitrust is concerned with the effects of market behavior and structure upon consumer welfare. Other matters, if they raise problems, must be taken care of by other laws.

Paradox at 248; emphasis in original.

Much has been made during this debate of Judge Bork's "nuances," the implication being that there may be points in his thinking too subtle for the committee and the American people to grasp. But the report's authors do not have the excuse of incomprehension. In assessing Judge Bork's views in the antitrust area, the drafters of the report clearly understand what Judge Bork has said and written; they nevertheless consciously misrepresent those views. It is a sad thing -- and one that for the sake of the country should not be repeated -- to see a Supreme Court nominee evaluated with such a lack of seriousness and such a disregard for reasoned argument.

11

THE ALLEGED "CONFIRMATION CONVERSIONS"

(Reply to Majority Report, pp. 93-96)

The majority report acknowledges that "much has been made of [Judge Bork's] so-called 'confirmation conversion.'" Indeed, some Senators have announced their intentions to vote against Judge Bork chiefly on this ground. Yet the majority cites alleged shifts in position on only three issues: (1) women's rights under the equal protection clause; (2) the "clear and present danger" test for speech advocating the violent overthrow of our government; and (3) First Amendment protection for non-political speech. (Majority Report, p. 93.) In making its allegations, the majority misrepresents Judge Bork's positions and seems incapable of understanding that all judges -- especially those who advocate judicial restraint -- can and do respect and follow precedent with which they personally disagree.

I. WOMEN'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE

Contrary to the majority report's charge (Majority Report, p. 45), Judge Bork has never written or stated anywhere that the equal protection clause does not apply to women. Judge Bork testified to his view that the equal protection clause applies to all persons, pursuant to its plain language: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." He directly refuted the charge that he was changing his position: "I never complained about applying the clause [to women]." (Tr., Sept. 18, 1987, p. 266.) As he pointed out with respect to his constitutional law classes at Yale

University: "I have been teaching those cases in which [the Supreme Court] applied the equal protection clause to women before, and I have never criticized them, never complained about them." (Id.)

The majority report overlooks this unambiguous testimony and claims that "[p]rior to the hearings, Judge Bork engaged in a sustained critique of applying the equal protection clause to women." (Majority Report, p. 45.) This so-called "sustained critique" is based on the majority's misuse of isolated quotations from a 1971 article and three speeches, none of which addresses the applicability of the equal protection clause to women.

A. The 1971 Article

When Bork wrote his 1971 article Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971), the equal protection clause had not yet been used to strike down a gender-based classification, so Bork could hardly have been criticizing this later development. What Judge Bork's 1971 article actually did was to join Justice Harlan's criticism (expressed in Justice Harlan's dissent in Shapiro v. Thompson, 394 U.S. 618 (1969), of a strand of equal protection analysis unrelated to women's rights -- i.e., whether some rights are more deserving of equal protection than others. Bork and Harlan argued against such an approach.

At the time of the article, there were three strands of equal protection law: (1) distinctions between any persons, including men and women, were invalid unless they had a "rational basis"; (2) race and ethnicity were "suspect classifications"

subject to "strict scrutiny"; and (3) classifications adversely affecting "fundamental rights" were also subject to "strict scrutiny." It was only the third strand of equal protection analysis, which denigrated some rights as inferior to others, that Bork addressed and criticized in his 1971 article.

Along with Harlan and Bork, many other legal scholars have criticized this third strand of equal protection analysis as unprincipled or incoherent. See, e.g., Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972); Wilkinson, The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 946, 950-56 (1975). And, perhaps because of the persuasive criticisms by Harlan, Bork, and others, the Court has not recognized any new "fundamental rights" under the equal protection clause since the 1969 Shapiro decision. See G. Gunther, Cases and Materials on Constitutional Law, p. 589 (11th ed. 1985); Note, Justice Stevens' Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146, 1149 n.16 (1987).

B. The Speeches

Neither do the quotations from Judge Bork's three cited speeches question the applicability of the clause to women. These quotations only criticize the "group-by-group" approach to the "suspect classification" strand of "strict scrutiny" analysis -- a criticism shared with Justice Stevens. Gender became a "suspect classification" under the Court's fragmented decision in Craig v. Boren, 429 U.S. 190 (1976). Three Justices -- Stevens, Burger,

and Rehnquist -- refused to hold gender a "suspect classification." Justice Powell also expressed his doubts as to the "multi-tiered" approach. Id. at 210, n.1. Nevertheless, the Court applied a new "intermediate" level of "scrutiny" to gender classifications. Justice Stevens forcefully attacked this new doctrinal development in a concurring opinion:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the Court to apply one standard of review in some cases and a different standard in other cases.

Id. at 211-12.

Justice Stevens' position is that all cases should be decided under the single "rational basis" test and that under that test classifications based on sexual stereotypes should be held irrational.[1] See Note, supra, 100 Harv. L. Rev. at 1155-56.

Judge Bork testified that he agrees with Justice Stevens' approach -- an approach that has led to the same results in gender cases as the problematic "multitiered" approach. Bork explained:

> I objected to [the way] the Supreme Court was using a method of saying this group, illegitimate children, aliens is in; this group, somebody else, is out. That seemed to me to be a very funny way to proceed . . . because we have no evidence that any of those groups are meant to be in or out. It is much better to proceed under the reasonableness test . . . Any person is covered. That means everybody is covered, men, women, everybody.

Tr., Sept. 16, pp. 73-74.

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[1] The Court had previously struck down a gender-based classification in Reed v. Reed, 404 U.S. 71 (1971), by applying the usual "rationality" standard of review. (Majority Report, pp. 55-56.)

The majority report asserts that if Judge Bork has adopted the Stevens test, he has done so only at the hearings. But the plain fact is that before the hearings, Judge Bork had not written or spoken at all (other than in the classroom) concerning the applicability of the equal protection clause to women or concerning the proper level of scrutiny. The majority's charge of a "confirmation conversion" is based on its own groundless pre-hearing propaganda.

II. DISSIDENT POLITICAL SPEECH

The majority report accuses Bork of having made a "dramatic change in position" on political speech when he testified that he accepts the "clear and present danger" test as formulated by the Supreme Court in the Brandenburg decision "as settled law." (Majority Report, p. 94.) The majority also charges that Bork took inconsistent positions when he refused to disavow earlier theoretical criticism of Brandenburg on September 17, after saying the previous day that Brandenburg is "right." (Id. at 52.)

Review of the testimony refutes the majority's charges. At no point did Judge Bork recant his theoretical criticisms of Justice Holmes' rationale for protecting advocacy of violence or of the Brandenburg rule. Rather, on both September 16 and September 17, Bork indicated only that he accepted Brandenburg as stare decisis. He testified that the rule was "an acceptable

place for the law to settle" (Tr., Sept. 16, p. 135), "a position which is okay," and law that he would apply as a judge. (Tr., Sept. 17, p. 216).

Nevertheless, Judge Bork reiterated his conclusion that the Holmes position is logically inconsistent (Tr., Sept. 17, p. 214).[2] Judge Bork explained that he accepted the Brandenburg requirement of "imminent lawless action" not because he endorsed Holmes' theory, but because he judged our society to be strong and stable enough to tolerate advocacy of violence. (Tr., Sept. 16, pp. 120, 121, 127.)

As Judge Bork observed during his testimony on Brandenburg:

> If disagreement on theoretical basis with a case you are willing to accept as an established precedent is somehow a problem, then I think every candidate who has thought about areas of the law is going to have a problem. Because many cases we [judges] accept we don't agree with . . . .

Tr. Sept. 17, p. 209.

All judges recognize that they must respect and follow precedent with which they personally disagree, and should seek to overrule precedent only for compelling reasons. The majority report's astonishing conclusion that Judge Bork's position creates an "irresolvable tension" (Majority Report, p. 22) would disqualify every qualified candidate from membership on the Court. It is

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[2] Holmes contended that the speaker's ideas must be given a chance to be "accepted by the dominant forces of the community." Bork's criticism is that, if the speaker's ideas are accepted by the "dominant forces" in a democratic society, those ideas will have their way without the need for violent overthrow.

ironic -- indeed, Kafkaesque -- that the majority would cast a "pall of orthodoxy" on the federal judiciary over the issue of dissident speech.

III. NON-POLITICAL SPEECH

The majority report finds Judge Bork's acceptance of the Supreme Court's opinions protecting non-political expression inconsistent with his position "prior to the hearings" that speech must relate in some way to the political process in order to obtain protection. (Majority Report, pp. 55-56, 94.) The facts are, first, that Judge Bork continues to stress the central importance of protecting our free and open political process; and second, that he has come to see more and more kinds of free speech in our society as crucial to that protection. To persist in calling this development "inconsistency" in a pejorative sense is to show deep intolerance for complexity in the law and for the necessary role of change in the life of any thoughtful, nondoctrinaire person.

In addition, Judge Bork accepts the current position of the Court as "settled law" which he would apply and not seek to change. (Tr., Sept. 17, p. 20.) This, too, is a position that the report simply chooses to ignore.

The majority's portrait of Judge Bork's pre-hearing statements is misleadingly incomplete. The report (Majority Report, pp. 55-56) relies on a quote from a 1979 speech.[3] But the

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[3] In the speech, Judge Bork stated: "But in these indirect and relatively remote relationships to the political process [such as (Footnote Continued)

majority must be aware that Judge Bork modified these views well before the hearings, in a 1984 letter to the ABA Journal stating: "I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to a democratic government and deserve protection." This shift was the sign of a scholar's willingness to reexamine his views and change them in a reasoned manner consistent with his underlying philosophy of judicial restraint.

Judge Bork's testimony reveals that his current views on the protection of nonpolitical speech are identical to the views expressed in his 1984 letter. He testified that:

> [T]he realm of politics extends much more through life than it used to, particularly in part because of the spread of Government throughout life. So that the area of what is political or what affects politics has expanded enormously, and fiction affects it and . . . so on.

Tr., Sept. 16, pp. 111-12.

The committee cites a 1985 interview in which Judge Bork indicated that the Framers could not have intended that "paintings, statues, dancing and so forth -- anything that's expressive -- is protected." During his testimony, Judge Bork pointed out that this interview was primarily a discussion of whether the Framers would have protected nude dancing (Tr., Sept. 17, at 19); the majority ignores this testimony. Judge Bork

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(Footnote Continued)
art], verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation." (Majority Report, pp. 55-56.)

also testified that "there are all kinds of forms of expression, discourse, literature that seriously affect the way we view our society and the way we view ourselves and so forth, and I am willing to protect that." (Tr., Sept. 17, p. 20.) He adhered to his view that he would not protect obscenity or pornography, but said that he would probably protect topless dancing by an African dance troupe because "that is . . . a cultural display, and it does affect our view of things." (Tr., Sept. 17, pp. 20-21.)

Judge Bork's positions demonstrate not inconsistency but a willingness to reexamine his views and to expand First Amendment protection to forms of speech that are important to the political function of speech in a democratic society. In this he reveals a consistent determination to preserve and defend the core value protected by the First Amendment.

Prior to the committee hearings, Judge Bork's critics attempted to paint him as a rigid, inflexible ideologue. When his testimony quickly demonstrated this characterization to be absurd, the charge shifted. Changes in Judge Bork's views that disprove his intellectual inflexibility are now presented as evidence of a lack of principle or willingness to compromise principle in order to be confirmed as a Justice. The new charge is as unfair as the old one.

The charge is reminiscent of nothing so much as the old custom in which women accused of being witches were thrown into the water. If they drowned, they were innocent. If they floated, they were displaying powers that could only belong to a witch, so

they were burned. The analogous reasoning in the majority report would raise a smile were it not for the dangerous precedent set by the irresponsibility of the argument.

12

JUDGE BORK AND CRIMINAL LAW ENFORCEMENT

(Reply to Omissions in Majority Report)

Criminal law issues take up almost one-third of the Supreme Court's docket. This is by far the single largest category of matters that the Court must address. The record discloses that the chairman believed that "the vast majority of the committee" found Judge Bork's criminal law views to be acceptable, presumably because they comported with the views of the committee's members. Thus, the majority report notes that Senator Biden, addressing a group of law enforcement witnesses[1] who were testifying in support of Judge Bork, stated:

> [O]f all the areas of the law, we've spent the least amount of time discussing . . . the law enforcement side . . . . [T]he vast majority of the committee, those for and against, are in agreement with you [in] joining Judge Bork as it relates to law enforcement.

Tr. Sept. 22, p. 295; emphasis added.

If the majority's position has, in fact, been accurately characterized by Chairman Biden, then it should acknowledge

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1 Donald Baldwin, Executive Director, The National Law Enforcement Council; Dewey Stokes, President, Fraternal Order of Police; Robert Fuesel, President, Federal Criminal Investigators Association; Jerry Vaughn, Executive Director, International Association of Chiefs of Police; John Bellizzi, Executive Director, International Narcotics Enforcement Officers Associa- tion; Gary Bittick, Executive Director, National Sheriffs Association; John Duffy, Chairman, Law and Legislative Committee, National Sheriffs Association; John Hughes, Director, National Troopers Association; Frank Carrington, Executive Director, Victims' Assistance Legal Association.

affirmatively Judge Bork's acceptability in the criminal law field. Put another way, if criminal law were the test, Judge Bork would apparently receive support from "the vast majority" of the Senators on the Judiciary Committee.

If, on the other hand, the majority Senators deliberately did not question Judge Bork about law enforcement because they knew his responses would help his confirmation and, therefore, damage their efforts to do him in, then, of course, that too deserves the attention of the full Senate when Judge Bork's nomination is debated.

In any case, it is plain that Judge Bork would, in fact, bring to the Supreme Court an outlook on criminal justice issues that marks him as a solid mainstream jurist and not a member of either lunatic fringe. The record establishes this beyond any doubt.

Judge Bork has testified that the Constitution in at least four places recognizes the death penalty. This means that, like Justice Powell whom he would replace, Judge Bork cannot find capital punishment <u>per se</u> unconstitutional. This is, of course, an unexceptionable mainstream view, based on the words of the Constitution and supported overwhelmingly by the people.

The Constitution and the American people are also in agreement on the principles that courts must apply to determinations of guilt or innocence for those accused of crime. In response to Senator Humphrey, Judge Bork summarized those principles:

> I think a judge has two responsibilities. One is to ensure that any accused gets a fair, completely fair trial, so that he is not prejudiced in any way. But the other responsibility is not to elaborate legal doctrine so that the appeal becomes a game, and somebody gets off on a technicality, which has nothing to do with fairness.

Tr., Sept. 18, p. 39.

Judge Bork has stated succinctly the right standards for criminal trials. Judges must see to it that every defendant's absolute right to a fair trial is fully protected, while insuring that defendants are not absolved from responsibility for their acts for reasons that have nothing to do with fairness.

Judge Bork's record as a Circuit Judge demonstrates that in criminal cases he has applied these principles fully and fairly. Judge Bork has not hesitated to reverse convictions where the trial was unfair, where the evidence was insufficient, or where the Constitution mandated reversal. In other criminal cases Judge Bork and his colleagues affirmed convictions and in those cases justice was done. None of these decisions -- whether reversing or affirming convictions -- has been reversed either en banc or by the Supreme Court.

Judge Bork's performance as Solicitor General also establishes that his abiding commitment to the Constitution will mean fairness to both accuser and accused. Two examples make this point. In Gregg v. Georgia, 428 U.S. 153 (1976), he argued in an amicus brief that the death penalty was not a violation of the Eight Amendment's prohibition of cruel and unusual punishment. The Supreme Court agreed, in a decision supported by Justice Powell.

In another case Judge Bork was called upon to defend the federal conviction of a black man for narcotics and criminal income tax charges. This defendant's petition to the Supreme Court claimed that the government's principal witness had committed perjury at trial. After an investigation Judge Bork determined that the government should confess error and ask the Supreme Court to remand the case to the court of appeals to consider whether the conviction should be reversed. He took this principled action over the strong protests of the United States Attorney because he believed that the question of the fairness of defendant's trial demanded it be done.

In the light of his record, it is not surprising that Judge Bork's sound approach to criminal law issues has met with approval from diverse quarters. Roy Innes, Chairman of the Congress of Racial Equality, has cited it as a reason why he supports confirmation here. So too have representatives of over 400,000 law enforcement officers (Tr., Sept. 22, pp. 247-88) as well as the President-Elect of the National Association of District Attorneys. (Tr., Sept. 23, pp. 229-30.)

In sum, Judge Bork's record shows beyond any doubt that on criminal law issues he would adhere faithfully to the Constitution's mandate that every defendant receive a fair trial without reaching to grasp a Constitutional or other rationale for insisting that the system provide a perfect one. That is no more and no less than the Constitution and the people can demand. Not even the most strident opponents of his confirmation have objected to his record and philosophy in this critical area. That is because they cannot do so.

ACLU FOUNDATION
132 WEST 43RD STREET
NEW YORK, NY 10036

Priority Letter

6*24300073812 2231033

BUSINESS REPLY

0800 EST 31 AUG 87

LATE YESTERDAY ACLU BOARD VOTED TO OPPOSE NOMINATION OF JUDGE ROBERT BORK TO U.S. SUPREME COURT.

ARE MOVING AT ONCE TO PUT IN MOTION NATIONWIDE MOBILIZATION PLAN TO BLOCK HIS APPOINTMENT.

DETAILED RESEARCH REVEALS BORK FAR MORE DANGEROUS THAN PREVIOUSLY BELIEVED. HIS STATED VIEWS CLEARLY PLACE HIM OUTSIDE ANY RANGE OF JUDICIAL PHILOSOPHY ACCEPTABLE IN RECENT DECADES. IF HIS VIEWS WERE TO PREVAIL WE RISK NOTHING SHORT OF WRECKING ENTIRE BILL OF RIGHTS AND FEDERAL COURTS IN PROTECTING INDIVIDUAL LIBERTY.

ACLU'S DECISION NOT PREMISED ON SINGLE ISSUE LIKE ABORTION ... RACIAL EQUALITY ... SEX DISCRIMINATION ... PRIVACY ... RELIGIOUS LIBERTY ... OR ARTISTIC FREEDOM -- EVEN THOUGH ALL THESE WOULD BE IN GRAVE DANGER. OUR DECISION TO OPPOSE IS FAR MORE BASIC: HIS CONFIRMATION WOULD THREATEN OUR SYSTEM OF GOVERNMENT.

HE DOES NOT BELIEVE IN SUPREME COURT'S ROLE AS DEFENDER OF LIBERTY AGAINST GOVERNMENT ABUSE. IN HIS MIND CONSTITUTION PROTECTS POWER OF MAJORITY TO IMPOSE ITS MORAL VALUES ON ALL CITIZENS. RECORD SHOWS HE BELIEVES THAT SUPREME COURT MUST DEFER TO THE WILL OF LOCAL MAJORITIES -- STATE AND LOCAL LEGISLATURES.

THIS IS BASIS FOR DESTROYING PROTECTIVE FUNCTION OF FEDERAL COURTS AND OVERTHROWING AMERICAN TRADITION OF TOLERANCE FOR MINORITY BELIEFS. CHURCH/STATE ISSUE GOOD EXAMPLE. BORK SAYS "GOVERNMENT IS INEVITABLY ENTANGLED WITH RELIGION." HE BELIEVES "...EXCLUSION (OF RELIGION IN PUBLIC SCHOOLS) IS AN AFFRONT TO DEMOCRATIC MAJORITY."

AM PREPARING DETAILED MEMO FOR YOU. TIME IS SHORT. URGENTLY NEED YOUR IMMEDIATE FINANCIAL HELP TO LAUNCH THIS MOBILIZATION. ONLY TOUGH, TARGETED CAMPAIGN WILL WORK. PRESS RELEASES, SINGLE ISSUE PLEAS, 'SHOUTING FROM ROOFTOPS' SIMPLY NOT ENOUGH.

ACLU IN UNIQUE POSITION TO MAKE DIFFERENCE BECAUSE SENATE KNOWS WE HAVE SPECIAL CREDIBILITY WHERE ENTIRE BILL OF RIGHTS AND FEDERAL

Priority Letter

8724000719822 2391038

COURTS CONCERNED.

SENATE VOTE LIKELY TO BE DECIDED BY SLIMMEST OF MARGINS. ACLU MOST EFFECTIVE CIVIL LIBERTIES VOICE IN WASHINGTON. HIGHLY RESPECTED BY SENATE. CAN MAKE THE CRITICAL DIFFERENCE.

EARLY THIS MORNING BEGAN MOBILIZATION TO FOCUS ON KEY SENATE VOTES ... REVEAL STARTLING RESULTS OF OUR RESEARCH TO SENATORS AND EDITORIAL BOARDS ... AND MARSHALL SUPPORT OF OPINION LEADERS IN KEY STATES.

REQUIRES EXTRA STAFF, SOPHISTICATED MATERIALS, BEST LEGAL TALENT AVAILABLE, ACTIVATING OUR NETWORK OF STATE AFFILIATES. ENORMOUSLY EXPENSIVE.

YOUR SPECIAL HELP CRITICAL. TIME IS SHORT. HEARINGS START SOON. URGE YOU TO RUSH EMERGENCY CONTRIBUTION AT ONCE.

GREATER DETAIL ABOUT EMERGENCY NOW .N.
MEANWHILE WANTED YOU TO KNOW OF BO : YOUR
IMMEDIATE HELP.

IRA GLASSER, EXECUTIVE DIRECTOR, A

MY EMERGENCY, TAX-DEDUCTIBLE CONTI E TO AMERICAN
CIVIL LIBERTIES UNION FOUNDATION) .TION OF
ROBERT BORK IS ENCLOSED. PLEASE PUT IT TO WORK IMMED ATELY AND
KEEP ME POSTED.

( ) $450 ( ) $600 ( ) $750 ( ) OTHER $.....

40667042 NB41

FROM:

REFOLD ENTIRE LETTER SO THAT RETURN ADDRESS AND PERMIT NO.SHOW
****THROUGH WINDOW OF BUSINESS REPLY ENVELOPE. NO POSTAGE NEEDED.****

FIRST CLASS PERMIT NO. 7031 NEW YORK NY
----------POSTAGE WILL BE PAID BY ADDRESSEE----------

RETURN TO: IRA GLASSER, EXECUTIVE DIRECTOR
ACLU FOUNDATION
132 WEST 43RD STREET
NEW YORK, NY 10036

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

October 20, 1987

THE CAMPAIGN AGAINST BORK: HOW FAR IS TOO FAR?

Every political debate has its exaggerated charges and inflated rhetoric. But the falsehoods spread in the last four months by the anti-Bork campaign have been much uglier than the usual give-and-take of American public life.

First, the campaign has told a considerable number of plain lies, using words that are either false or deliberately twisted to convey the opposite of the truth.

Here are just a few examples:

--People for the American Way's main anti-Bork TV ad is narrated by Gregory Peck. Bork, says Peck in the ad, "defended poll taxes and literacy tests, which kept many Americans from voting." Anyone who actually took these positions would indeed be unfit to sit on today's Supreme Court.

But the accusation is a lie. Robert Bork has never defended any poll tax, and he has never defended any literacy test.

He has, as is well known, argued with parts of some of the Supreme Court's opinions on these matters, on the grounds that the Court reached its conclusion through wrong reasoning. That is a very long way from defending poll taxes. To say otherwise is simple falsification of the facts.

--One of PFAW's big newspaper ads against Judge Bork claims he ruled that a company could force women to be sterilized

or lose their jobs. Five women, the ad goes on to say, "underwent surgical sterilization."

The fact is that the women who chose sterilization were not part of the case that Judge Bork heard. No woman was coerced into sterilization as the result of any ruling Judge Bork made.

You can see why this particular lie is an especially inflammatory one.

--The National Abortion Rights Action League has gone farther on the subject of sterilization. A NARAL anti-Bork newspaper ad says, "According to Bork, women can be forced to choose between being sterilized and losing their jobs." Anyone who really takes this position as NARAL states it, is of course a moral monster.

Here is what really happened: A case that Judge Bork once heard on appeal involved chemical company jobs that exposed workers to relatively high levels of lead. The lead caused birth defects. It was established, however, that the company could not get the lead out of the process. This was the awful circumstance that forced some women into their grim choice, not anything done or said by Judge Bork.

--A Planned Parenthood anti-Bork ad begins, "Robert Bork's Position on Reproductive Rights: You Don't Have Any." This is, needless to say, an absurd slander even on the face of it.

--This Planned Parenthood ad also says, "Bork sees the Court not as a problem-solver, guided by past decisions, but as a reckless troublemaker." Judge Bork sees no such thing. He has said the opposite at length under oath. Not one word he has writ-

ten in his five years as a judge on the U.S. Court of Appeals provides evidence to the contrary.

--A self-described "study" by Public Citizen accuses Judge Bork of favoring business over consumers 96 percent of the time in "controversial" cases. This "study" ignores 86 percent of Judge Bork's opinions to reach this conclusion.

--It is hardly necessary to repeat the scurrilous details of Senator Kennedy's "back alley abortion" campaign opener.

Second, the anti-Bork campaign has relied on a good number of larger, but no less clear, distortions of the record.

--For instance, the campaign has repeatedly accused Judge Bork of having called the 1964 Civil Rights Act, or the principle of the Act, something of "unsurpassed ugliness."

The real story is this: In that 1963 New Republic article in which the controversial phrase occurred, then-Professor Bork quoted Mark DeWolfe Howe, who had said that Southern resistance to civil rights advances was an effort to preserve the "ugly customs of a stubborn people."

Bork agreed with him. As Bork put it, "Of the ugliness of racial discrimination there need be no argument." He also expressed this sentiment elsewhere in the article.

What worried Bork, though, was that even the best intentioned legislation, like civil rights laws designed to prevent the oppression of a minority, could at some point turn into another form of coercion by a majority. It was coercion, according to Bork, that was the idea of "unsurpassed ugliness."

Bork chose to make his argument using the word "ugliness," of course, to emphasize that he was addressing the same set of problems originally raised by Mark DeWolfe Howe.

Bork's worries were by no means the anxieties of an extremist. In that same issue of the liberal New Republic, the editors wrote that many of the magazine's readers shared Bork's doubts.

Bork was wrong in his 1963 analysis of the pending civil rights legislation. He repudiated this early view, publicly, fourteen years ago. To attack Bork using a position that he long ago disowned is character assassination. To present that early phrase of his as evidence of racism is worse.

--A final example: The anti-Bork campaign's use of the word "extremism" goes beyond the bounds of honest differences of opinion. Judge Bork has sat on a federal appeals court for five years. To take only the most dramatic of the statistics on this issue, he has never been reversed by the Supreme Court. He is the only judge of the D.C. Circuit Court with this record. Judge Bork's fellow Circuit Court judges appointed by Democratic presidents have voted with him from 75 ranging upward to 91 percent of the time.

There is simply no intelligible meaning of the word "extremist" that fits these facts.

The people campaigning against Judge Bork may have an answer to this challenge. But we do not know, because they have dealt with it by simply sweeping his judicial years under the rug and acting virtually as if they did not exist.

This is not honest. It is the sort of practice that tries to prevent difficult questions from ever being discussed. It is not fitting behavior in a free society committed to settling its disputes through the open competition of conflicting positions and ideas.

Respectfully submitted,

COMMITTEE FOR A FAIR
CONFIRMATION PROCESS

BY: Leonard Garment
Leonard Garment

Of Counsel,

Griffin Bell
Carla Hills
Michael Armstrong
Leonard Garment

Why the U.S. Senate should take a very close look at Robert Bork.

advice and consent

President Reagan has nominated Robert H. Bork to the U.S. Supreme Court. Under the Constitution, the U.S. Senate must give on all judicial nominations. In other words, the President names someone to the Court, but the Senate has an equal power to confirm or reject the nominee.

If the Senate should reject the nomination, it would not be unusual in American history. All told, it has happened to nearly twenty percent of all Court nominees and to nine Presidents from George Washington to Richard Nixon.

In looking at this nominee, the Senate has valid reason to examine his ideology and philosophy. As the Cleveland Plain Dealer put it, "His ideology, his conservative legal philosophy—in short, his politics. Reagan considered them; so must the Senate."

In the end, a Supreme Court Justice is not supposed to be a White House "team player," similar to a Cabinet member. The Supreme Court is a separate branch of government, and Justices are supposed to be independent of mind as they rule for a lifetime on the rights of all Americans.

Before granting such power to Robert Bork, the Senate must satisfy itself on these and other important questions:

Is he qualified? There is more to a Supreme Court nominee's fitness than good grades in law school or high marks from fellow lawyers. The Senate should examine Mr. Bork carefully—his independence, his sense of justice, his entire record, including his role in the 1973 Saturday Night Massacre.

Is he independent? At the height of the major constitutional crisis of our time, Watergate, Robert Bork fired special prosecutor Archibald Cox. After his superiors resigned rather than follow Richard Nixon's order, what principle of justice permitted Robert Bork to carry it out?

Is he fairminded? The Senate should learn why Mr. Bork criticized a congressional ban on literacy tests used to prevent minorities from voting. Or why he so consistently favored large corporations in cases involving anti-trust, consumer protection, pollution, and worker safety issues.

Does he believe in equal justice? Robert Bork has written in favor of a Virginia poll tax, against equal accommodations for black Americans, and against the principle of "one man-one vote." The Senate must know whether Mr. Bork will try to roll back the clock on the civil rights gains of the last three decades.

Does he believe in the right to privacy? He has argued many times that the Constitution does not specifically recognize the right to privacy. In one case he said the state could prevent married couples from using contraceptives at home.

Will he protect free speech? Robert Bork has said that the First Amendment applies only to speech that is "explicitly political," not to artistic, literary, and scientific expression. While he says he has changed his mind, it is not clear whether he still thinks artistic expression should be free. Therefore, the Senate needs to understand how he would judge the content of literature, the theater, movies, television, tapes, records, concerts and live performances.

The Senate should know why, on issue after issue, from access to the courts to the rights of minorities, he has consistently condemned the Supreme Court's efforts to protect individual rights and precious freedoms.

As Business Week said, "Justice wears a blindfold, but the Senate . . . should not."

Before the hearings begin in September, we urge you to learn how your Senators view Robert Bork and we urge you to learn more about him yourself.

People For The American Way

If you want to know more about Mr. Bork's views, write to us. People For The American Way has studied and summarized his record in six areas: Civil Rights, Privacy, Church-State, Free Speech, Special Prosecutor / Saturday Night Massacre, and Judicial Philosophy. Write People For the American Way, 1424 16th Street N.W., Washington, D.C. 20036.

What women have to fear from Robert Bork.

You wouldn't vote for a politician who threatened to wipe out every advance women have made in the 20th Century. Yet your Senators are poised to cast a vote that could do just that. Senate confirmation of Robert Bork to the Supreme Court might cost you the right to make your most personal and private decisions. His rulings might leave you no choice – in relationships, in childbearing, in your career. He must be stopped. Tell your Senators. Our lives depend on it.

If Robert Bork is confirmed to the Supreme Court, he'll be the deciding vote on questions that affect every aspect of our lives.

The fair-minded, deliberate, balanced Supreme Court we're all familiar with will be a thing of the past. A right-wing 5-4 majority will prevail for decades.

Robert Bork's writings and his record demonstrate a hostility to rights most women would consider fundamental, from personal privacy to the equality of women and men before the law. And he's threatened to overturn any Supreme Court precedent that stands in his way.

According to Bork, women can be forced to choose between being sterilized and losing their jobs...

A state can declare the use of birth control illegal and invade your privacy to enforce the law...

You wouldn't even be protected against sexual harassment at work. (Robert Bork doesn't believe such coercion is "discriminatory".)

The fact is, Robert Bork's nomination threatens almost every major gain women have made since we won the right to vote. He would deny women the freedom, fairness and independence we've come to expect as first-class citizens.

Stripped of our most basic Constitutional guarantees of personal privacy and equal protection, women would have no defense against the "moral majority" extremists.

First to go? Your right to make a private decision about abortion. With Bork on the Court, your basic freedom to decide when, whether and under what circumstances to bear children could be taken away forever.

A state could ban both birth control *and* abortion – throwing women back to the age when pregnancy was, in effect, compulsory and women risked their lives to terminate a pregnancy.

Far-fetched? Far from it.

Attempts have already been made to officially permit discrimination against women who've chosen abortion – even though abortion is entirely legal. Women who made this profoundly private decision, protected by our Constitution, could be singled out and denied education and employment opportunities.

The Supreme Court nominee doesn't think vital Constitutional guarantees apply to women.

And a Supreme Court dominated by the right would do nothing to stop it.

Whatever your personal feeling about abortion, the decision must be up to you – not imposed by some political appointee.

But then, that's precisely why Robert Bork was nominated to the Supreme Court. His expedient reading of the Constitution allows "moral majority" extremists to hope they can force their dogma on the rest of us under penalty of law.

Beginning with abortion. But extending from there into every aspect of women's lives, personal and professional, as if the U.S. Constitution simply didn't apply to women.

The choice is stark.

Your Senators can confirm Robert Bork – inviting right-wing extremists to challenge every right we possess.

Or they can reject Robert Bork – and uphold the Constitutional standards of freedom and fairness.

This is your chance to determine the course of our country and the status of women in a free society. Act now.

Or a man you've never met will decide your future for you.

We're one vote away from losing our most fundamental rights... one Justice away from injustice. Your Senators must hear from you. Many are undecided on Bork... and wonder if you know how much is at stake. Mail the coupons immediately. Robert Bork must be stopped. And it's your turn to make history.

Senator [ ]
Senate Office Building
Washington, D.C. 20510

Dear Senator,

We cannot accept a Supreme Court Justice who doesn't think the Constitution protects the rights of women. Robert Bork is an extremist nominated by extremists. Reject him, as the Senate has rejected five out of five nominees in the past. Demand a Justice who understands the fundamental value of privacy and fairness. Our lives depend on it.

NAME
ADDRESS
CITY STATE ZIP

Senator [ ]
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NAME
ADDRESS
CITY STATE ZIP

I've joined the fight to halt this assault on my most fundamental rights by mailing the coupons to both my Senators in time to make the difference.

I'm able to support your nationwide campaign to beat Bork and preserve the reproductive rights of all women.

— $25 — $15 — $50 — $100 — $500

Pull out all stops. This is the moment of decision. There's no going back.

NAME
ADDRESS
CITY STATE ZIP

NARAL

National Abortion Rights Action League
1101 14th Street, NW 5th Floor
Washington, D.C. 20005

Robert Bork's Position on Reproductive Rights:

If your senators vote to confirm the Administration's latest Supreme Court nominee, you'll need more than a prescription to get birth control. It might take a constitutional amendment. Robert Bork is an extremist who believes you have no constitutional right to personal privacy. He thinks the government is free to dictate what you can and can't do in such personal and intimate matters such as marriage, childbearing, parenting. If he wins a lifetime seat on the Supreme Court, Bork could radically change the way Americans live. Here's how to stop him, and why...

For years, "moral majority" extremists – with the active support of the White House – have been trying to impose their beliefs on the rest of us. They think they have the right to tell us how to live your life. So far, our democratic system has blocked them.

But now, in the waning days of the Reagan Administration, they just might succeed after all.

They've been given their very own Supreme Court nominee – an ultra-conservative judicial extremist named Robert Bork – who has repeatedly attacked important Court decisions which protect your right to privacy and freedom from government interference in your most personal and private decisions.

Bork has long been known in legal circles for his highly unusual ideas on civil rights, free speech and personal privacy.

Claiming to possess the only correct method for interpreting the Constitution (he says it can discern the "original intent" of the men who wrote it two centuries ago), Bork uses obscure academic theory to arrive at positions that he himself admits may appear "bizarre."

As a law professor, Bork's opinions were a private matter. But as a Supreme Court justice, he would have the power to change your life.

YOU DON'T HAVE ANY.

Decades of Supreme Court decisions uphold your freedom to make your own decisions about marriage and family, childbearing and parenting. But Robert Bork is convinced that government has the power to interfere in the most intimate areas of all:

- He attacks as "utterly specious" the landmark Supreme Court decision striking down a ban by the state of Connecticut on the use of birth control by married couples in the privacy of their own homes.
- In a case involving a company which produced dangerous amounts of toxic lead, Bork refused to strike down a company policy which required female employees to become sterilized, or to be fired from their jobs.
- He denounces the Supreme Court decision recognizing a woman's right to choose abortion – to make a private medical decision about her own pregnancy – as "wholly unjustifiable" and "unconstitutional."
- Stripped of privacy protections, we couldn't even choose our own relationships or living arrangements without fear of government intrusion. Bork upheld a local zoning board's power to prevent a grandmother from living with her grandchildren because she didn't belong to the "nuclear family."

Is this the sort of closed-minded extremism we want on the Supreme Court? Are we ready to turn back the clock to a time when "moral majorities" choked off almost all family planning options through a welter of state and local laws?

It has happened before. Deprived of your constitutional right to privacy, it can happen again.

Presidents serve four years, senators serve six. But Robert Bork – if confirmed by the U.S. Senate – will be on the Supreme Court for life.

For right-wing extremists to claim Bork shouldn't be rejected on ideological grounds, when ideology got him nominated in the first place, is absurd.

The Senate historically has rejected one out of every five nominations to the Supreme Court. The Senate has a responsibility to consider nominees on the basis of how they think and what they believe – not just their narrow technical qualifications.

Would Robert Bork preserve the Court's social consensus or spark disastrous conflict? Safeguard our liberties or threaten their very existence? Balance the Court or throw it dangerously out of kilter, into the hands of extremists eager to tell us how to live our lives?

Bork has acknowledged, "There are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny."

But Bork's record proves beyond any doubt that he fiercely believes the most private and personal aspects of our lives – marriage, childbearing, parenting – are *not* protected by the Constitution from government intrusion.

STATE-CONTROLLED PREGNANCY? It's not as far-fetched as it sounds. Carrying Bork's position to its logical end, states could ban or require any method of birth control, impose family quotas for population purposes, make abortion a crime, or sterilize anyone they choose. The way he reads it, nothing in the U.S. Constitution – including long-standing Supreme Court decisions – protects Americans from these and other barbaric violations of basic human rights.

Of the eight justices now on the Supreme Court, four have generally been part of a moderate and balanced consensus protecting Constitutional rights and liberties.

Four more justices (two named by Reagan) generally vote against expansion of our basic freedoms. Retired Justice Powell was the pivot...

...but right-winger Bork would throw the Court off balance.

The Senate vote on Bork may be more important than the next presidential election. Make sure your senators know where you stand.

If you don't have the right to make life's most important decisions – free of outside interference – what are the rest of your rights worth?

If the Senate confirms Robert Bork, it will be too late. Your personal privacy, one of the most cherished and unique features of American life, has never been in greater danger. Please, mail the coupons immediately.

Do the court justice. Block Bork.

[illegible] Bork may be your most important vote on a senator. Bork is a radical extremist who will throw the Supreme Court out of balance. Reject Bork and demand an open-minded nominee who represents our constitutional traditions and who doesn't have an ideological agenda.

Name _____

Address _____

City _____ State _____ Zip _____

Senator Daniel Patrick Moynihan
Senate Building #[illegible]
Washington, D.C. 20510

The selection of Robert Bork may be your most important vote on a senator. Bork is a radical extremist who will throw the Supreme Court out of balance. Reject Bork and demand an open-minded nominee who represents our constitutional traditions and who doesn't have an ideological agenda.

Name _____

Address _____

City _____ State _____ Zip _____

Planned Parenthood of New York City, Inc.
[illegible] Avenue, 3rd floor
New York, NY 10019

I've sent the coupons opposing Bork to my senators. Send me the booklet "8 Reasons to Oppose Robert Bork" so I can alert others. I'm enclosing my contribution in support of all Planned Parenthood's activities and programs.
$25 ☐ $50 ☐ $75 ☐ $250 ☐ $500 or $_____

Name _____

Address _____

City _____ State _____ Zip _____

Mail now or CALL your Senators (202) 224-3121.

Planned Parenthood®

Robert Bork vs. The People.

The nomination of Robert Bork for a vacant seat on the Supreme Court has caused a lot of controversy. And has a lot of people worried.

With good reason.

Robert Bork is a federal judge and former law school professor with extremist legal views. His views are so extreme that over the last 25 years he has consistently taken positions against the Constitutional rights of average Americans.

But don't take our word for it. You be the judge:

Sterilizing workers. A major chemical company was pumping so much lead into the workplace that female employees who became pregnant were risking having babies with birth defects. Instead of cleaning up the air, the company ordered all women workers to be sterilized or lose their jobs. When the union took the company to court, Judge Bork ruled in favor of the company. Five women underwent surgical sterilization. Within months, the company closed the dangerous part of the plant. And the sterilized women lost their jobs. [OCAW v. American Cyanamid, 1984]

Billing consumers for power they never got. Judge Bork supported an electric utility that wanted consumers to pay for a nuclear power plant that was never built. Thanks to Judge Bork, consumers got a bill for $400 million. [Jersey Central Power & Light v. FERC, 1984]

No privacy. Asked by TIME magazine in July if he found a right to privacy in the Constitution, he declared, "I do not." To this day he says the Supreme Court was wrong when it stopped one state from making the use of contraceptives by married couples a punishable crime. [1986 Judicial Notice, regarding Griswold v. Connecticut]

Turn back the clock on civil rights? "Unsurpassed ugliness." That's how Professor Bork described a law that said hotels and restaurants had to serve black Americans. He also criticized decisions that stopped states from using poll taxes and literacy tests to keep minorities from voting. And he opposed the decision that made all Americans equal at the ballot box — "one man-one vote." Ask yourself: Should America go back and re-fight settled civil rights battles? If Robert Bork is on the Court, we may have to.

No day in court. Robert Bork has long believed that courts should not hear certain kinds of cases. In 14 out of 14 controversial cases involving people on social security, military veterans, minorities, the handicapped and the homeless, Judge Bork refused to give them their day in court.

Big business is always right. Recent studies reveal that Judge Bork has already made up his mind that large corporations are nearly always right. One study found he favored corporations over consumers 96% of the time. Another showed he ruled in favor of utility companies in 5 out of 5 utility rate cases. In 10 out of 10 regulatory cases, he decided in favor of business. And in his book on antitrust laws, he said the federal government should "never interfere with conglomerate mergers."

If you look past his resumé, you see that Judge Bork has consistently ruled against the interests of people. Against our Constitutional rights. And in favor of his extremist philosophy.

His views are so extreme the White House image-makers have launched a national campaign to re-package him as a "moderate." Even Judge Bork himself is out changing his image, lobbying the Senate and the media.

We're fighting back. We're People For The American Way. 270,000 Americans—Democrats, Independents, and Republicans — committed to protecting American values.

Those values have never faced a tougher challenge than Robert Bork. Please help. Write your Senators. And support our Action Fund.

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ANTI-BORK ADVERTISEMENT BY GREGORY PECK

Voice: There's a special feeling of awe people get when they visit the Supreme Court of the United States -- the ultimate guardian of our rights as Americans. That's why we set the highest standards for our highest court justices, and that's why we're so concerned. This is Gregory Peck. Robert Bork wants to be a Supreme Court Justice but the record shows that he has a strange idea of what justice is. He defended poll taxes and literacy tests which kept many Americans from voting. He opposed the civil rights law that ended "whites only" signs at lunch counters. He doesn't believe the Constitution protects your right to privacy, and he thinks that freedom of speech does not apply to literature and art and music. Robert Bork could have the last word on your rights as citizens, but the Senate has the last word on him. Please urge your Senators to vote against the Bork nomination, because if Robert Bork wins a seat on the Supreme Court it will be for life -- his life and yours.

[Scene: A young family (mother, father and two sons -- approximately 7 and 9 years old) walks up the stairs of the Supreme Court Building and stares at the inscription ("Equal Justice Under Law") above the door (father points it out to youngest son). The camera then focuses on the Court building, which shortly thereafter swings back to make room on the left-hand side of the screen for a head and shoulders shot of Judge Bork. Thereafter Robert Bork is on the left of the screen and the Supreme Court building is on the right. After a few moments, the

Supreme Court building swings back to fill the entire screen and eliminate Bork. The camera then shows the family members once again staring at the Supreme Court (supposedly pondering the protection it provides U.S. citizens), while a gentle wind ruffles their hair.]

WHY THE UNITED STATES SENATE SHOULD NOT CONSENT TO THE NOMINATION OF JUDGE ROBERT H. BORK TO BE A JUSTICE OF THE SUPREME COURT

A COMMON CAUSE REPORT

Philip Heymann, Senior Counsel
Fred Wertheimer, President
September, 1987

The heart of the issue presented to the Senate by President Reagan's nomination of Judge Robert H. Bork is whether the role of the Supreme Court, as we have understood it for half a century, should be radically changed and greatly diminished. Judge Bork has relentlessly advocated such a view for more than two decades. He was nominated in order to put this view into effect. The Senate must fully share with the President responsibility for any proposal to change radically -- to reduce drastically -- the role the Supreme Court has played for fifty years. A Senator who believes that the allocation of responsibilities among our three great branches of government is basically sound and opposes radical change must vote against the nomination.

The grounds of Common Cause's opposition to Judge Bork's confirmation are straightforward. First, Judge Bork has built his career upon the premise that the role the Supreme Court has played for fifty years should be changed radically. He has indicated, as clearly as an individual not on the Court could, that he would if confirmed seek to put into effect the views he has so often and so publicly urged -- drastically reducing the Court's role. Second, Judge Bork's case for abandoning the Court's traditional approach to constitutional decision-making is without merit or real substance. The nation has benefited from the continuity of jurisprudence that has resulted from reliance on precedence by both conservative and liberal courts over the past fifty years. Third, the cost of accepting the drastically reduced role of the Supreme Court sought by Judge Bork would be, as he has explicitly acknowledged over the years, the sacrifice of an imposing range of liberties and rights that we now identify with being an American citizen.

For half a century, the great conservative as well as liberal Justices of the Supreme Court have understood that the framers of the Constitution and its amendments intended the Supreme Court to play a central role in protecting the liberties and rights of individuals under such broad provisions as the "due process" and "equal protection"

clauses, as well as under more specific provisions of the Constitution. The courts as a result have long been open to a variety of claims by individuals for constitutional protection against actions of the states and the federal government. Judge Bork's philosophy would have prevented recognition of many of these claims, involving numerous rights we all now take for granted. Judge Bork has found "judicial tyranny" in the Court's recognition of these rights and has urged that much of the jurisprudence of a half-century be rooted out by new Justices who would not allow individuals to challenge the state on the basis of the grand principles of due process and equal protection and who would narrow the reach of the First Amendment.

The allocation of responsibilities among our three great branches is fundamentally sound, and the Supreme Court has served the country well over the last half-century. Judge Bork's nomination represents a radical rejection of much of the Court's work and of the way it has reached its decisions; and it represents a concrete effort to put that rejection into effect. For that reason Common Cause is taking the extremely rare step of opposing a judicial nominee, the unprecedented step of opposing a nominee to the Supreme Court.

I. The Role of the Senate

Despite a strong case for a far more active Senate role in the confirmation of Supreme Court nominees, based on the language, the history, and the precedent of the "Advice and Consent" clause, the Senate has been cautious in consideration of matters of ideology and political philosophy. Avoiding stalemate between the nominating President and the reviewing Senate has seemed an important enough objective to warrant some senatorial deference in the great majority of cases. The benefits are great, the cost small in most cases; for the candidate, whether conservative or liberal, feels bound by the widely accepted obligation of Justices to respect the prior

judgments and wisdom of the Court. But this is not the case with Judge Bork.

When a nominee to the Supreme Court has made as clear as he possibly can his belief that whole bodies of decisions by the Court are illegitimate and unconstitutional -- and when the President has chosen the nominee precisely because of this radical belief -- the Senate must resolve for itself the very fundamental questions the nomination presents. When the nominee represents an extremely narrow view of what the Court may properly consider in reaching its decisions, the Senate must decide whether to accept that view. When accepting the nominee's views would amount to endorsing a number of constitutional amendments, the Senate must decide whether it approves of that step.

Quite simply, in this case the Senate must decide whether it wants wholesale changes in our present body of constitutional law and in the way future questions are to be addressed by the Supreme Court (i.e., wholesale changes in the jurisprudence of the Court). For that is what the President is proposing in nominating the most committed apostle of a very basic change in Supreme Court practice. A vigorous review would be the obligation of the Senate in the case of any candidate chosen in large part because he has devoted his career to an attack on the established jurisprudence of the Supreme Court. It is even more important where the particular nomination could have a decisive effect on the highest court of the land.

In saying this, we are not arguing that the President and the Senate lack the power, if they collectively so determine, to alter the established jurisprudence of the Supreme Court. President Roosevelt and the Senate attempted to do this with the appointments of Hugo Black and Felix Frankfurter in the late 1930s. But the President cannot do this alone, as Roosevelt found out when he earlier tried to pack the Court. The decision is too fundamental. It requires a full and

careful review by the Senate and its concurrence in any such change. Common Cause believes that the Senate of the United States should not concur in the radical change that Judge Bork's appointment would represent.

II. Judge Bork's Theory of Constitutional Adjudication

Judge Bork has made plain that he rejects a major part of the jurisprudence of the Supreme Court.

The Court for almost two centuries has based many of its decisions on the constantly growing body of prior decisions of the Court. It has traditionally looked to those decisions as a source of legitimacy, wisdom and understanding, not merely as a raw fact of life complicated to undo. For Judge Bork, a Supreme Court Justice owes no such respect to the body of prior decisions. Judge Bork says that there are dozens of Supreme Court decisions which "nobody believes the Constitution allows", and which a Justice of his philosophy "would have no problem whatever in overruling." See Part III.

The Court throughout its history has acknowledged that our shared sense of what is constitutionally proper treatment of individuals has evolved and has been shaped as we have learned from experience. In 1909, Justice McKenna explained of the clause forbidding cruel and unusual punishment that it "may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. U.S., 217 U.S. 349, 378. "The Equal Protection Clause is not shackled to the political theory of a particular era." Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1965). Thus the Court has long assumed that an evolving national morality could lead to a firm consensus as to the rights of individuals and that such judgments about rights are not, as Judge Bork has characterized them, arbitrary preferences for some "gratifications" over others. The Court has not regarded judicial recognition of such rights as "minority tyranny", in the words of Judge Bork. In seeking to learn from experience, the Court has turned to history, morality, the views of the

states, and the structure of liberties and obligations found in several provisions of the Constitution.

Moreover, the Court has long accepted a judicial responsibility for defining what John Harlan, one of the great conservative Justices of the 20th century, described as "the balance which our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Judge Bork rejects this judicial responsibility. Justice Harlan went on to note that "the balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." According to Harlan, constitutional purposes are not only rationally perceived but also "historically developed." Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J. dissenting). According to Judge Bork, they are not.

No one spoke more lucidly for this set of premises that has characterized a great portion of Supreme Court decisions than Justice Felix Frankfurter. Thus Justice Frankfurter saw that each new decision must "take its place in relation to what went before and further [cut] a channel for what is to come." Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J. dissenting). "Great concepts like ... 'liberty' ... were purposely left to gather meaning from experience." National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J. dissenting). Justice Frankfurter saw no reason to fear, as Judge Bork does, "judicial tyranny" in this very traditional process. As Justice Frankfurter explained, "Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process ... these are considerations deeply rooted in reason and in the compelling traditions of the legal profession." Rochin v. California, 342 U.S. 165, 170-171. This has been an essential part of the

role and tradition of the Supreme Court for generations. It is rejected by Judge Bork.

Thus, in the broadest sense, there has been a recognition for two centuries that the process of understanding the implications of the Constitution is not a simple one of applying readily derived general principles to novel circumstances but a difficult one of collective deliberation, informed by history and experience, on what those general principles themselves mean. This process has been central to the judicial philosophy of the great conservative Justices, such as Harlan and Frankfurter, as well as the great liberal Justices of the Court.

All of this Judge Bork has rejected in disdainful and cutting prose over a period of twenty-five years. He has built his career as a constitutional scholar on the demand that these forms of reasoning -- which constitute much of the jurisprudence of the Supreme Court over two centuries -- be rejected as judicial imperialism, as unprincipled efforts to favor one man's gratifications over that of another, as minority tyranny that is as much a usurpation of authority as some form of coup by the Joint Chiefs of Staff, and, speaking of the famous Holmes and Brandeis dissents which form the basis of much of our First Amendment law, as rhetoric that swamps analysis. In place of a long and rich tradition of Supreme Court jurisprudence, Judge Bork has substituted a radically simplified theory of constitutional adjudication: in all but the clearest of cases, the views of legislative majorities must prevail over claims of individual rights and liberties.

In the fields of free speech, racial equality, privacy rights, family autonomy, and voting rights, Judge Bork has made clear his disdain for the leading cases of this century. He differs from other legal scholars who have criticized some of the decisions he attacks in that he has for decades set forth a view of Supreme Court jurisprudence that denies the

legitimacy of all these decisions and that promises sweeping changes in the very processes followed by the Court since its earliest days. In this he has set himself the task of reversing history.

III. Judge Bork's Willingness To Carry Out His Radical Theory

The White House has attempted to portray Judge Bork as a moderately conservative middle-of-the-roader. But to portray Judge Bork as a man with other than a radical vision of how Supreme Court jurisprudence must change is disingenuous when he has been selected by the President and recommended to other groups for the sweeping changes his views would work. The issue is more honestly drawn by Judge Bork himself, who spoke at the University of San Diego Law School of our being "at a tipping point in the relationship of judicial power to democracy. The opposing philosophies about the role of judges are being articulated more clearly ... The future role of the American Judiciary will be decided by the victory of one set of ideas or the other."

Furthermore, there is no basis for believing that Judge Bork will hesitate to carry out the philosophy he has articulated throughout his adult life. Describing his theory calling for a sharply reduced role of the Supreme Court as that of an "originalist", Judge Bork explained to the First Annual Lawyers' Convention of the Federalist Society earlier this year:

> "Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended."

There is no comforting possibility either that Judge Bork is talking of the occasional overruling of precedent that every Justice must contemplate. He is describing an undertaking of a far vaster scope, a wholesale attack on much of the work of the Supreme Court. In the 1981 Senate

Judiciary Committee hearings on the Human Life Bill (97th Cong., 1st Sess., p. 315), Judge Bork explained that, even aside from Roe v. Wade, "nobody believes the Constitution allows ... the decision ... in dozens of other cases of recent years." In opposing the bill he stated that it "proposes a change in our constitutional arrangements no less drastic than that which the judiciary has accomplished over the past 25 years."

Judge Bork has left no room for mistake about his views of how much must be undone. In a 1986 piece in the Encyclopedia of the American Constitution he again explains how far-reaching he believes these "judicial excesses" are. "The Court ... began in the mid-1950s to make ... decisions for which it offered little or no constitutional argument .... Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution."

In other words, Judge Bork says that there are dozens of Supreme Court decisions which "nobody believes the Constitution allows", and which a Justice of his philosophy "would have no problem whatever in overruling."

A willingness to overrule the many decisions inconsistent with his doctrine is an essential part of Judge Bork's developed philosophy.

> "Amending the Constitution is not a general solution to judicial expansion; there are too many serious judicial excesses to make amendment a feasible tool of correction .... [T]he answer can only lie in the selection of judges, which means that the solution will be intermittent, depending upon the President's ability to choose well and his opportunities to choose at all." R. Bork, "'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement, 1981, pp. 109-110.

For Judge Bork "[d]emocratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views." "Judicial Review and Democracy," Encyclopedia of the American Constitution, v. 3, p. 1062 (1986).

Judge Bork may be unwilling at this stage to make clear how much fidelity he would show to the articulated philosophy of an adult life. Asked, for example, in an interview in 1985

whether he could identify any Supreme Court doctrines that he considered particularly worthy of reconsideration in the 1980s, his answer was a careful "Yes, I can, but I won't." District Lawyer, May-June 1985, Volume 9, Number 5, page 32. As has been shown, however, Judge Bork has been far clearer on other occasions.

No one can ever know with absolute certainty how a nominee would decide if placed on the bench of the Supreme Court. But there will never be a case where the candidate has made his intentions clearer than Judge Bork has. It would be foolhardy for anyone to act on the assumption that Judge Bork will accept and follow the precedents he has spent twenty-five years denouncing or will hesitate to act in ways that his judicial philosophy plainly requires. Gambling with the future of the Supreme Court would be a grave mistake, even if a nominee's radical plans were far less certain than the plans of Judge Bork.

IV. The Implication For Constitutional Law of Judge Bork's Appointment

What areas of constitutional law would be changed dramatically if one were to adopt Judge Bork's views of constitutional jurisprudence? The answer must be found in his writings, speeches and interviews over the past twenty-five years. There is little to be learned from Judge Bork's Court of Appeal decisions. Even one who believes, as Judge Bork does, that the Supreme Court has been acting illegitimately for decades must recognize the obligation of a lower court judge to follow the decisions of the Supreme Court. For the best general discussion of his judicial philosophy, Judge Bork himself referred readers of the Conservative Digest in 1985 to his article in volume 47 of the Indiana Law Journal, "Neutral Principles and Some First Amendment Problems". It, along with other writings, speeches, and interviews, tell us the following about his views of the Constitution:

A. No part of the First Amendment protections of free speech has been more basic than the notion that only a "clear and present danger" can justify a prohibition of even inflamatory political speech. But Judge Bork has argued that this revered test "erects a barrier to legislative rule where none should exist." 47 Indiana L.J. 1, 33. Nor is it clear, even in Judge Bork's more recent views, whether modes of expression such as art, which do not "feed into the way we govern ourselves", are protected. Artistic expression, in Judge Bork's interview with Bill Moyers aired on May 28th of this year, is "getting towards the outer edge ... and where you draw the line would be a case by case basis."

B. Judge Bork is very clear about his views of the legislative reapportionment cases which established the "one person, one vote" requirement. "Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." 47 Indiana L.J. 1, 18.

Judge Bork also rejects the legitimacy of Harper v. Virginia Board of Election, 383 U.S. 663 (1966), which struck down the use of poll taxes in state elections. Foreword to "The Constitution and Contemporary Constitutional Theory" by Gary McDowell, Center for Judicial Studies. Presumably with rejection of Harper goes rejection of decisions following Harper holding that the states may not impose property-owning requirements on voters or candidates.

C. Judge Bork's views on rights of privacy are at least as clear. Of course he rejects Roe v. Wade but with it much more. In his opinion, the decision of the Supreme Court in Griswold v. Connecticut, which struck down Connecticut's statute making it a crime even for married couples to use

contraceptives, "fails every test of neutrality. The derivation of the principle was utterly specious and so was its definition." 47 Indiana L.J. 1, 9. The state is therefore free, according to Judge Bork's views, to place someone in jail for using -- or failing to use -- contraceptives.

For Judge Bork there is simply no constitutional protection of decisions about whether to have a family, or how many children to have or not have. Judge Bork thinks a state needs no special justification for enforced sterilization. He rejects what the Supreme Court held 45 years ago:

> "We are dealing here with civil legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

Judge Bork is equally certain "that Griswold's antecedents were also wrongly decided, e.g., Meyer v. Nebraska, which struck down a statute forbidding the teaching of subjects in any language other than English; [and] Pierce v. Society of Sisters, which set aside a statute compelling all Oregon school children to attend public schools ...." 47 Indiana L.J. 1, 11. Thus, for Judge Bork, the Court was creating law impermissibly, when it said in Meyer of the "liberty" protected by the Fourteenth Amendment that: "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual ... to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience ..."

As to Pierce v. Society of Sisters, Judge Bork believes the Court was acting unconstitutionally in deciding that:

> "The fundamental theory of liberty upon which all governments in this Union repose excluded any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The

> child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligation." 268 U.S. 510 at 535 (1925).

(He does acknowledge, but without specification, that there might be some alternative way to protect the right of parents to use parochial schools.)

Meyer and Pierce, decisions protecting the family's autonomy in limited areas, have stood and been honored for more than sixty years. Together with Skinner they have formed the underpinning for an important line of protections of marriage and other familial relations. Zablocki v. Redhail, 434 U.S. 374, 383-386 (1978); Moore v. East Cleveland, 431 U.S. 494, 499 (1977); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639-640 (1974); Boddie v. Connecticut, 401 U.S. 371, 376 (1971). Judge Bork rejects these protections.

D. Finally, and perhaps most importantly, there is the area of civil rights. Judge Bork passionately condemned the public accommodation provisions of the 1964 Civil Rights Act, but later retracted that position. For him, Justice Powell's opinion for the Court in the Bakke case -- holding that universities may not use raw racial quotas but may consider race among other factors in the interest of diversity among the student body -- is "justified neither by the theory that the Amendment is pro-Black nor that it is colorblind"; rather it "must be seen as an uneasy compromise resting upon no constitutional footing of its own." Judge Bork accords the decision only the political advantages of sending to medical school "the courageous and badly treated Bakke" and defeating "the hardcore racists of reverse discrimination". Wall Street Journal, July 21, 1978.

The efforts of Congress to protect voting rights would be threatened by Judge Bork's views. He rejects the Court's decisions in Katzenbach v. Morgan, 384 U.S. 641 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970), affording deference to Congress in determining the scope of protectable rights

under Section 5 of the Fourteenth and Section 2 of the Fifteenth Amendment. Both cases sustain the power of Congress to forbid literacy tests for voters in circumstances involving dangers of discrimination or the effects of past discrimination. For Judge Bork, both represent "very bad, indeed pernicious, constitutional law." Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., pp. 313-14.

Writing in the Washington University Law Quarterly in 1979, Judge Bork rejected as "liberal shibboleth" the premise underlying many civil rights protections: "[T]hat the poor or the black are underrepresented politically is quite dubious .... The poor and the minorities have had access to the political process and have done very well through it." 3 Wash. Univ. L. Qtrly 695, 701. As to other groups, Judge Bork has been even clearer. He has said that, "cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or equal protection clause." 47 Indiana L.J. at 17. Judge Bork's reasoning is simple, albeit radical. "All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." Id. at 11-12.

V. Conclusion

The radical view of constitutional jurisprudence that Judge Bork has advocated for twenty-five years has immense implications. The Senate should reject Judge Bork's nomination because the case for abandoning much of the Court's traditional approach to constitutional decision-making is without merit and because the adoption of his views in specific areas of constitutional law would be profoundly harmful to the nation.

The message of President Reagan in nominating Judge Bork -- the message Judge Bork has himself carried far and wide for

decades -- is false. Neither the Burger nor the Warren Court has been a danger to the United States. Our nation has not suffered from the unwillingness of the Burger Court to overrule many of the precedents of the Warren Court. On the contrary, it has benefited from the continuity and from the conservative instinct of the Burger Court to work within a framework of precedent in developing its own approach to many areas of law. For half a century the Supreme Court has served us well in the profoundly important areas of racial equality and individual liberties. There is no cause for a radical undoing of the precedents of this period.

Yet the near opposite of all this is what Judge Bork has urged repeatedly, unequivocally, and even derisively for twenty-five years. President Reagan chose Judge Bork because of the views he has so explicitly embraced, views calling for a radical shift in the directions that the Supreme Court has pursued and in the methods that have been used by both conservative and liberal majorities. To reject that call, to reject the nominee, is not to favor a liberal or conservative philosophy in any traditional sense. It is to affirm the role of the Supreme Court as it has been understood for decades.

Community Free Democrats

172 West 85 Street New York, NY 10024 (212) 362-1719

September 30th, 1987

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The Honorable Joseph R. Biden
Chairman, Senate Judiciary
Committee
Washington, D. C. 20510

Dear Senator Biden:

In accordance with a resolution passed by our Board of Directors and Membership-at-Large, we have gone on record as being opposed to the Confirmation of Judge Robert H. Bork to the United States Supreme Court.

The enclosed Petitions, of 1200 signatories (which includes the names of Public and Party Officials) is but a token of the sentiment expressed in our area. Due to our local primary, a large number of Petitions have not as yet been returned.

Should your Committee bring this matter of confirmation to the Senate floor (with or without a recommendation), we will pull out all stops to amass an amount that will eclipse the enclosed.

We, the Community Free Democrats, would like to compliment you on the manner in which you conducted these hearings. You conducted yourself with dignity and extreme fairness.

Respectfully yours,

Linda Rosenthal
President

Hilda B. Classon*
Recording Secretary
Chair, Petition Committee

*200 West 86th Street
New York, N. Y. 10024

15 Glen Road
Sparta, New Jersey 07871-1901

September 29, 1987

United States Senate
Committee on the Judiciary
Senate Dirksen Office Building
Constitution Avenue and First Street, Northeast
Washington, District of Columbia 20510

Mr. Chairman and Members of the Committee:

We, the undersigned, oppose the confirmation of Judge Robert Bork as a justice of the United States Supreme Court for the reasons that follow, and we respectfully ask that you enter this, our written testimony, into the official record of your hearing regarding Judge Bork's confirmation.

Since this procedure began on September 15, we have closely listened to Judge Bork's responses to questions from your committee, his explanations of his past and current positions, and to all the witnesses, to date, who either support or oppose his confirmation.

As students of American history and as citizens who cherish their freedom, we are troubled by a number of Judge Bork's positions in regard to the Constitution and the role of the courts, particularly the Supreme Court, in safeguarding our rights.

From his own lips and hand, Judge Bork has set forth a record of judicial philosophy that is worthy of an eighteenth century Federalist, but which would prove disastrous to an America on the threshold of the twenty-first century. Now Judge Bork

wishes to set aside that record by declaring it to be the intellectual ruminations of an academician. Portraying himself as a person who has traversed the political spectrum, from left to right, first adopting then rejecting extremist theories in his quest for truth, Judge Bork would have us believe that he his current positions are at odds with the lengthy scholarly record he has amassed.

As any reasonable person knows, there is a great gulf between scholarly dissertations and the real world. Yet, Judge Bork appears to live in some ethereal world where the Constitution is cast in stone and the intent of the framers is frozen in time. And that is the issue central to your confirmation or rejection of Judge Bork's appointment to the Supreme Court.

The opinions Judge Bork has issued while sitting on a federal appellate bench cannot be used to surmise what he might do as a member of the highest court. The strictures, precedents and protocols lower court judges feel bound by do not apply to Supreme Court justices. We must not forget that it was Charles Evan Hughes who said: "We are under a Constitution, but the Constitution is what the judges say it is."

What does Judge Bork say the Constitution is? Judge Bork has been very articulate about what he thinks the Constitution is not. Judge Bork has condemned the Court on a number of occasions for creating rights which he says he cannot find in the Constitution. He has, incongruously enough, criticized the Court's means in other cases for arriving at decisions with

which he says he agrees. Ironically, while Judge Bork has made somewhat of a career out of lecturing and writing on the Court's allegedly faulty reasoning to arrive at ends even he supports, and claims the Court could have made the same decision based upon other provisions of the Constitution rather than the ones it chose, he says he has given no thought to what provisions the Court should have used. This is indeed a strange position for a person deemed to be a scholar. It is all too easy to condemn or criticize, but it takes a great deal of reasoning to offer an alternative.

Judge Bork is fond of tossing about phrases such as "original intent" and "judicial activism." When asked by Bill Moyers just what he meant by the former, he defined "original intent" as original values to fit today's circumstances in order to protect values or processes the framers were trying to protect. Judge Bork's definition of "original intent" is contradictory in view of his opposition to "judicial activism."

More importantly, how does one go about discovering the "original intent" of the framers? When they met in Philadelphia they were charged not with drawing a new national charter, but amending the Articles of Confederation to make them workable. Having decided that task was impossible, they locked the doors and drew the draperies, not only to keep secret the fact that they were not doing what they had been directed to do, but also to create a climate amenable to open debate. Before the convention ended, however, a motion was made and passed that

the official journals, kept by convention secretary William Jackson, and other papers of the convention be turned over to George Washington, to be retained by him "subject to the order of Congress, if ever formed under the Constitution."

If the framers were as concerned with "original intent," as is Judge Bork, would they have deprived the people and the states that had to ratify the new Constitution the journals and papers which would have added to their understanding of the framers' intentions? Hardly.

Since the framers held diverse, and often opposite, points of view about what this nation should be, as did the states that ratified the compromise we call the Constitution, the search for original intent in every word, clause and article is a futile one.

As for Judge Bork's position that the Bill of Rights was a hastily drawn document with little thought behind it, that is not only insulting to Madison, Jefferson and all the others who championed such a bill, but the historical record proves Judge Bork wrong.

The thing that we all should be focusing on is that it was the original intent of the framers to constrain government, not the people. That is clear in the words, "We the People of the United States." The Bill of Rights was added not only to spell out some of the significant rights retained by the people, but to protect minorities against majority tyranny. These are the points that seem to have gotten lost in two-hundred years of

judicial hair-splitting over what rights belong to whom and when.

As a result, eminent jurists, such as Judge Bork, have held that the Constitution and the amendments thereto, as a whole, do not apply to the states. Yet, articles IV and VI state the contrary. Judge Bork has called the Ninth Amendment an "ink blot" on the Bill of Rights, contending that no one knows what it means. Because there is little legal precedent involving the Ninth Amendment, that is hardly reason for dismissing it or claiming it is merely a repeat of the Tenth Amendment. Madison was not given to repetition and perhaps if Judge Bork delved deeper into Madison's speech in Congress, and the draft of a bill of rights he presented, Judge Bork might come to the understanding that the Ninth Amendment means precisely what it says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is rights -- enumerated, unenumerated and inalienable -- spoken of here, not powers as specified in the Tenth Amendment.

Even though some may not care to look at it that way, the Supreme Court is the ultimate guardian of the Constitution and the court of last resort in safeguarding our precious rights and freedoms. The justices who sit on that court must be cognizant of these duties. They must be flexible in their thinking. We need visionaries on the court, not rigid traditionalists or ideologues, who will respect, recognize and

uphold the all the rights of the people, enumerated and unenumerated. Judge Bork simply doesn't measure up to those qualifications.

Respectfully submitted,

Bev Conover

Elton M. Conover, Jr.

THE MEXICO CITY NEWS FRIDAY, AUGUST 28, 1987 15

Letter To The Editor

Dear Editor:

William Safire's seductive article (The News, Aug. 13) advocating Judge Bork's confirmation to the Supreme Court is beguiling, but not constitutionally profound. Safire proclaims "fitness as an individual" to be the essence of the confirmation standard, but neglects to define "fitness." A nominee's "fitness" for the Supreme Court must take into account his constitutional philosophy, as well as his credentials. Safire, no constitutional authority, will doubtless be surprised to learn that Bork has no "constitutional philosophy." Ronald Dworkin, professor of jurisprudence at University College, Oxford, and professor of constitutional law at New York University, has recently written in an article discussing Bork's nomination: "His constitutional philosophy is empty; not just impoverished and unattractive, but no philosophy at all. . . . Bork is a constitutional radical who. . . rejects the view that the Supreme Court must test its interpretation of the Constitution against the principles latent in its own past decisions. . . . He regards central parts of settled constitutional law as mistakes now open to repeal by a right-wing court."

Safire may also be shocked to learn that Judge Antonio Scalia, an acknowledged conservative jurist, recently promoted to the Supreme Court, severely chided Judge Bork for joining in an Appeals Court decision declaring that the First Amendment protected newspaper columnists from a libel suit brought by a Marxist political scientist. Scalia, Bork's then colleague on that Court, dissented and excoriated Bork as being faithless to the intention of the framers of the First Amendment, who plainly did not suppose that they were changing the law of libel in the way the majority decision assumed.

Safire asks Senator Biden, the Judiciary Committee chairman, to "keep an open mind" and "astound us all" with a vote for confirmation. May I suggest that Safire, after absorbing the startling facts marshaled here, "keep an open mind" and "astound us all" by opposing the Bork nomination.

Respectfully,
Joseph H. Crown
Cuernavaca, Morelos

Crown's Comments

The Supreme Court crisis: the Bork nomination

by Joseph H. Crown

President Reagan's nomination of Judge Robert Bork to the United States Supreme Court has set the stage for the most controversial and confrontational battle *vis-a-vis* the Court's composition, paralleling President Roosevelt's "court-packing" proposal a mid-century ago. Mr. Reagan's selection of Judge Bork, a constitutional radical, is widely seen as tipping the ideological balance of the court to the far right, thus "packing" the Court. His previous rulings strongly indicate that, if confirmed by the Senate, he would provide the critical fifth vote on future cases that could overrule a host of the Supreme Court's decisions moving the law of the land sharply to the right. With the Supreme Court split 4-to-4, one vote on the Court could make as big a difference on any issue as a change of President or control of Congress.

President Reagan could thus succeed in "packing" the Court by mere selection, whereas President Roosevelt sought to change the complexion of the Court via legislation, which would have required a majority vote in both Senate and the House of Representatives. President Reagan's goal would require only a majority vote of the Senate.

Robert Bork: A Constitutional Radical

Ronald Dworkin, Professor of Jurisprudence and a Fellow at University College, Oxford, and Professor of Law at New York University, forcefully maintains that the Bork nomination presents the Senate with an unusual problem.

"For Bork's views do not lie within the scope of the longstanding debate between liberals and conservatives about the proper role of the Supreme Court. Bork is a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted. He rejects the view that the Supreme Court must test its interpretations of the Constitution against the principles latent in its own past decisions as well as other aspects of the nation's constitutional history. He regards central parts of settled constitutional law as mistakes now open to repeat by a right-wing court; and conservative as well as liberal senators should be troubled by the fact that... he has so far offered no coherent justifications for this radical, antilegal position". "Dworkin, *"The Bork Nomination.* The New York Review of Books, Aug. 13, 1987, p. 3.

This is a severe indictment rendered by a reknown authority of constitutional law, whose books, "Taking Rights Seriously", "A Matter of Principle", and "Law's Empire" have been universally acclaimed. Normally, the Senate has the responsibility and duty to scrutinize a Supreme Court nominee's constitutional philosophy every bit as carefully as his credentials. But in Bork's case, Dworkin maintains that the Senate faces a different issue: "not whether Bork has a persuasive of plausible constitutional philosophy, but whether he has any constitutional philosophy at all". And in a critical analysis of Bork's judicial decisions and his writtings, Prof. Dworkin concludes that "his constitutional philosophy is empty: not just impoverished and unattractive but no philosophy at all".

In the circumstances of the Bork nomination, the Senate's responsibility is particulary great. Bork if confirmed would be the third justice added to the Supreme Court by a President who has for seven years conducted an open and inflexible campaign of ideological appointments on all levels of the Federal courts, hoping to make them a citadel of right-wing power long after his administration ends. Reagan has not deigned to desguise the political character of Bork's appointment: he said the Bork is "widely regarded as the most prominent and intellectually powerfull advocate of judicial restraint", and that he "shares my view" of the proper role of the Court. The President has surely reflected his political values in nominating Bork. The Senate needs to reflect its values by whom it approves. The choice of a justice is a political act.

When the very conservative Justice William Rehnquist was elevated to Chief Justice a year ago and Justice Antonin Scalia appointed and confirmed, President Reagan was riding high and the Republicans not only controlled the Senate but also controlled the pace of Judiciary Committee proceedings. Now Mr. Reagan has not only lost control of the Senate but also public trust. And Attorney General Meese, his prime counselor on judicial appointments and whose first choise was Bork, is under several investigations.

Leonard B. Boudin, a prominent constitutional lawyer and general councel of the National Civil Liberties Committee, has called on the Senate to defer action on the Bork nomination until the outcome of the Iran-contra hearings and the investigation by the independent counsel, Laurence E. Walsh. He points out that President Reagan and Attorney General Meese are among the principal subjects of these investigations, which, together with the Tower Commission report, "have disclosed serious derelections of duty, including violation of the Constitution, domestic law, interna-

onal law and deception of both
e Congress and public", that "it
possible that the hearings will
sclose grounds for impeachment
the President..." Boudin fra-
es the "basic issue" in these
rms: "Would the Senate have
onsidered any nomination by
resident Richard M. Nixon while
s conduct as a co-conspirator
as under investigation by
ongress and by special prosecu-
rs, Archibald Cox and Leon Ja-
orzki?" (*The New York Times*,
p-Ed article, July 8, 1987).

Bork's appointment, if confi-
med, would achieve the dominance
f the right on the Supreme Court
at Reagan's previous appoint-
ents failed to secure. For Justice
owell, the pragmatic centrist,
ad been a swing vote, siding
ainly with the right on issues of
riminal law but with more liberal
stices on other issues of indivi-
ual rights, and provided the fifth
nd conclusive vote, one way or
e other, on many occasions. If
ork votes as those who support
m have every reason to expect he
ill, the Court will have lost the
alance that Powell provided. And
will also have lost the opportu-
ty for cases to be decided one by
e on the issues, rather than on so-
e simple ideological test. Hence
e Senate should not apply the re-
xed standards it does when a
resident seeks merely to have
s own constitutional philosophy
presented on the Supreme
ourt. As Dworkin warns: "The
ork nomination is the climactic
age of a very different presiden-
l ambition: to freeze that insti-
tion, for as long as possible, into
orthodoxy of the President's
n design."

here have Supreme Court no-
inees so clearly announced their
ositions on matters which may
me before the Court. Bork has
id that the Supreme Court's de-
sion in *Roe V. Wade*, which li-
ited a state's power to make
bortion criminal, was itself "un-
onstitutional", that the Court's
any decisions implementing the
one man, one vote" principal in
ational and local elections was
riously mistaken; that the Cons-
tutional plainly recognizes the
ropriety of the death penalty. He
as doubted the wisdom of the
onstitutional rule that the police
ay not use illegally-obtained evi-
nce in a criminal trial. He has
lied the suggestion that moral
minorities such as homosexuals might have constitutional rights against discrimination legally absurd. In a dissenting opinion on the Circuit Court, which the majority said contradicted strong Supreme Court precedent, he maintained that Congress cannot challenge in court the constitutionality of the president's acts. And Bork has strongly suggested that he would be ready, as a justice, to reverse past Supreme Court decisions he disapproved of. In a 1963 magazine article Bork denounced a major civil rights bill barring hotels and restaurants serving the general public from refusing to serve blacks. The idea of legislating "morality" in this manner, he said, was "a principle of unsurpassed ugliness". Legal scholars are alarmed at Bork's insistence on sharply limiting access to the Federal Courts. Aside from his rightist ideology, Bork's action as Solicitor General in 1973, dismissing Archibald Cox as the Watergate special prosecutor —an incident widely referred to as the "Saturday Night Massacre"— may be sufficient cause, by itself, to deny him confirmation.

The Senate's Right and Duty to Reject Nominees

The Framers of the Constitution divided the appointment power between the President and the Senate, just as they divided the treaty power. This sharing, in the late Senator Sam Erwin's words, made "the Senate's role... plainly equal to that of the President". If a Senator believes a nominee will undermine his conception of the Constitution, the Senator has the same right and duty as the President to protect his conception. Hence the Senate is bound to examine a Supreme Court nominee's political views, his Constitutional philosophy, his ideology as well as his credentials. It is not just a question whether the nominee had high grades in law school or is a good and honorable lawyer. As Chief Justice Rehnquist said almost 30 years ago, a nominee's views of the equal protection and due process clauses are equally important.

This si precisely what the Framers of the Constitution intended. And they made that proposition clear right from the start —and by those who created the Constitution. On June 29, 1795, John Jay, Chief Justice, resigned to become Governor of New York. President Washington offered the Chief Justiceship to John Rutledge of South Carolina, one of the most distinguished lawyers at the time. A popular President, a Federalist Senate, a distinguished candidate— confirmation should have been a shoe-in. But... the controversial Jay Treaty with England had been ratified a few weeks earlier, and support for the treaty was equated with true Federalism. John Rutledge, however, has attacked the treaty. Federalists leaders urged Washington to drop Rutledge. He refused. The Senate thereupon rejected the nomination, 14-10. Three of the 14 no-votes were signers of the Constitution, including Oliver Ellsworth, a dominant figure at the Philadelphia convention, popularly known as the father of the Federal Judiciary, and a future Chief Justice himself. He knew well a Senator's proper constitutional role.

Politics and ideology have played a role in many of the rejections or withdrawals under fire, which total 27. The Senate has rejected almost 20 percent of Presidential Supreme Court nominees. As recent as 1968, 19 Republican Senators declared they would vote against President Johnson's nomination of Abe Fortas as Chief Justice because Mr. Johnson was in his final year of office and they argued a new President —a Republican, they hoped (Nixon did indeed succeed Johnson)— should be allowed to make the nomination. The Republican Senators also fiercely attacked Mr. Fortas for his liberalism, for his views on free speech, capital punishment, law enforcement, Federalism and many others issues. They were successful. Their filibuster prevented Mr. Fortas' confirmation.

Constitutional authorities of all persuasions agree with Prof. Charles L. Black, Jr. of Columbia Law School that "in a world that knows that a man's social philosophy shapes his judicial behaviour, that philosophy is a factor in a man's fitness" to be a judge. James Madison's nomination of Alexander Wolcott in 1811 was rejected, 24-9, because Mr. Wolcott was considered too partisan. James Polk's nomination of George Woodward in 1845 was rejected,

29-20 (despite a 21 month vacancy on the Court) because of Mr. Woodward's anti-immigration attitudes. Several of President Grant's appointments failed because of their views on such issues as civil service. A nominee's views on slavery were decisive in at least two instances. In 1930, the Senate rejected Chief Judge John Parker of North Carolina because of anti-union rulings and anti-black remarks.

Herman Schwartz, professor of constitutional law at the American University, recently wrote: "The very conservative Antonin Scalia and Sandra Day O'Connor were virtually unopposed. No one ever seriously thought either threatened to subvert the Constitution. The nomination of Judge Bork poses just such a threat, however. In almost every contest —remedies for racial discrimination such as busing and affirmative action, access to the courts, abortion, contraception, women's rights, state neutrality in religion, protection for free expression, constitutional protections for the accused— Judge Bork has condemned the Supreme Court efforts". (*N. Y. Times*, Op-Ed. July 3, 1987).

It is fair to say, I believe, that during the 200 years of the Republic, no President nominated to the Supreme Court a candidate who "threatened to subvert the Constitution" until President Reagan's nomination of Judge Bork. Will the Senate allow such a threat to become a reality?

STATEMENT OF ROBERT P. DAVIDOW
PROFESSOR OF LAW, GEORGE MASON UNIVERSITY
IN OPPOSITION TO THE CONFIRMATION OF
ROBERT BORK AS ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

(This statement expresses my own views and not necessarily those of any organization with which I may be affiliated.)

I. INTRODUCTION

During the celebration of the Bicentennial of the United States Constitution we hear a great deal about the rule of law--and properly so, because it is the foundation of our constitutional system. It is, therefore, particularly unfortunate that the President should have nominated to the Supreme Court one who showed so little dedication to the rule of law in October 1973 during the Saturday Night Massacre. Robert Bork's firing of Special Prosecutor Archibald Cox cannot be evaluated without a consideration of the context in which it occurred.

II. FACTS

On 19 October 1973 President Nixon announced that he would not appeal a decision of a United States Court of Appeals requiring him to surrender certain tapes to Judge Sirica for review in camera to determine which tapes or portions thereof could be viewed by a sitting federal grand jury. At the same time the President announced that he was not going to comply with the Court of Appeals decision and that he was directing Special Prosecutor Archibald Cox to cease his efforts to obtain White House tapes through court action. When Cox announced that he would not accept the President's directive, the President, on 20 October 1973, directed that Cox be fired; this order was carried out by Solicitor General Robert Bork as Acting Attorney General after both Elliot Richardson and William Ruckleshaus had refused to carry out the order and had either resigned or been fired. Bork acted despite a Department of Justice regulation that stated that the Special Prosecutor would not be fired "except for extraordinary improprieties on his part." It was clear that Cox had not been guilty of any such "extraordinary improprieties."

III. ANALYSIS OF THE FORMAL LEGALITY OF BORK'S ACTION

Judge Gesell found that the firing of Cox was unlawful. Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), appeals dismissed as moot, No. 74-1260 (D.C. Cir. Aug. 20 and Oct. 22, 1975), vacated on remand, No. 1954-73 (D.D.C. Oct. 29, 1975).

In so doing, Judge Gesell relied in part on Service v. Dulles, 354 U.S. 363 (1957), and Vitarelli v. Seaton, 359 U.S. 535 (1959), for the proposition that "an Executive department may not discharge one of its officers in a manner inconsistent with its own regulations concerning such discharge." 366 F.Supp. at 108.

In United States v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court rejected President Nixon's claim of absolute executive privilege in connection with a subpoena duces tecum directed to the President in the context of a pending criminal case. In finding that the issue was justiciable (that is, that a case or controversy existed within the meaning of Article III to the Constitution and not merely an "intra-branch dispute" between a subordinate and superior officer of the Executive Branch), the Court cited with approval the cases relied on by Judge Gesell, and accepted the proposition set forth above:

> So long as this regulation is extant it has the force of law. In Accardi v. Saughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1953), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. Service v. Dulles, 354 U.S. 363, 388, 77 S. Ct. 1152, 1165, 1 L.Ed.2d 1403 (1957), and Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct.

968, 3 L.Ed. 2d 1012 (1959), reaffirmed the basic holding of Accardi.

> Here, as in Accardi, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.

418 U.S. at 695-96 (footnote omitted).

It is thus clear that Bork's firing of Cox was illegal.

Bork has now testified that "none of us thought that the regulation was a bar to a presidential order" and that "I think a Presidential order overrides an Attorney General's regulation." These statements disregard the requirements of the Administrative Procedures Act, 5 U.S.C. sec. 551, et seq.—requirements that Bork in essence recognized when, on 23 October 1973, he purported retroactively to rescind the underlying Watergate Special Prosecutor regulations. See Nader v. Bork, 366 F. Supp. at 107.

IV. ANALYSIS OF THE SUBSTANCE OF BORK'S ACTION

President Nixon ordered Cox fired in furtherance of the President's disobedience of the order of the United States Court of Appeals that the President turn over certain tapes to Judge Sirica. Thus Bork's action in firing Cox assisted the President in defying the Court of Appeals.

Bork has claimed that he acted to preserve the Justice Department; he feared that if he resigned, there would be mass resignations. He also has said that since he did not personally make any promises to Cox, he felt free to fire him. In this he is supported by Richardson's

testimony. What is lacking in this defense is any sense of loyalty to the rule of law, rather than merely to the Justice Department or to the principle that one should keep one's personal promises. Indeed, many persons have supposed that one of the purposes of the Justice Department is to secure compliance with the rule of law. And, of course, the assertion that Richardson's promise not to fire Cox "except for extraordinary improprieties" was a merely personal promise has been vigorously denied as a matter of historical fact by Senator Kennedy and by George Frampton, who was Assistant Special Prosecutor, Watergate Special Prosecution Force in October 1973. According to Frampton, "the 'promise' of an independent investigation was not his [Richardson's] promise at all. It was the President's promise, made through Mr. Richardson, a representation in behalf of the Executive Branch." Cox has recently indicated that the promise was an institutional, rather than a personal, promise: "The terms of my appointment contained unequivocal assurance of independence and a guarantee that I would not be removed from office unless guilty of gross misconduct." A. Cox, The Court and the Constitution 3 (1987).

Bork has said that one or two days after Cox's dismissal, Bork spoke to Henry Peterson, head of the Criminal Division of the Department of Justice, and Cox's two deputies, Henry Ruth and Phillip Lacovara. Said Bork (during the 1982 confirmation hearing): "I told them that I wanted them to continue as before with their investigation and with their prosecutions, that they would have complete independence, and that I would guard that independence, including the right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox." Ruth has now disputed this version of the facts. But even if it is assumed that Bork's version is correct, how credible was a promise of independence made by one who had just ended the independence of another person to whom similar promises has previously been made? As Ruth put it, "Mr. Bork, on Saturday night, fired Archibald Cox for [subpoenaing Presidential tapes and seeking court enforcement of a subpoena]. I had no reason to believe that Mr. Bork had undertaken a conversion in 48 hours and suddenly believed

that Mr. Cox was now right and all we needed was another body to do the same thing."

Contrary to Bork's claim, his firing of Cox did have an adverse effect on the investigation. Henry Ruth has testified: "It was only after a week and half [after the firing] where we thought that we were going to be back in business." And what caused the investigation to succeed was not Bork's action, but rather the President's capitulation in the face of the "firestorm of public outrage":

> Because the people did rise up morally and politically, the rule of law prevailed. The response doubtless flowed from many sources: disgust at the evidence already published, distrust engendered by the withholding of evidence, outrage that President Nixon should insist upon the dismissal of a man whose sole offense was to pursue the assignment given him, and should thus force Richardson and Ruckleshaus from office, determination that despite the President's interference the Watergate investigation should go forward under an independent Special Prosecution Force. I like to think that there was also present something deeper and more enduring--a realization that all our liberties depend upon compliance with law.

Cox, supra, at 25.

That Bork's subsequent actions were not responsible for the eventual success of the investigation has been confirmed by Ruth:

> Judge Bork and Henry Peterson told us to continue with our work, Senator. Judge Bork was irrelevant to whether our staff was going to stay together because we had no way of relying on anything he said at the time because he fired Archie Cox for pursuing evidence of criminal conversations by the President of the United States. The staff held together because of the integrity of the staff and the support of the public and the Congress in the hope that a new Special Prose-

cutor would come along. Judge Bork was neither a positive nor a negative in that respect. We did not pay any attention to him, Senator.

V. BORK'S ACTIONS IN PERSPECTIVE

One way to evaluate the significance of what Bork did is to note the reaction to the Saturday Night Massacre of persons prominent in the legal profession at the time. Seventeen law school deans, for example (including those of Harvard, Columbia, Yale, New York University, Chicago, Michigan, Pennsylvania, and Stanford), signed the following resolution:

> Whereas substantial evidence exists that close associates of the President of the United States, and possibly the President himself, have engaged in a deliberate effort to obstruct justice;
>
> Whereas public trust in the administration of justice requires that the evidence of such misconduct be investigated by prosecutors independent of those under investigation;
>
> And whereas the President has prevented such an independent inquiry from being conducted;
>
> Therefore, we the undersigned, deans of American law schools, respectfully petition the Congress of the United States to take the following measures:
>
> We urge that Congress act immediately by statute to establish a special Watergate prosecutor's office, with the special prosecutor to be appointed by a specified law court (as authorized in Article II, Section 2 of the United States Constitution) and with complete independence of the executive branch of Government.
>
> The President's stated refusal to comply with court rulings requiring him to produce relevant evidence raises a serious question as to whether he will cooperate fully with a Congressionally established prosecutor. There being only one course clearly open to the American people to protect against this contingency, we urge further that the House of Representatives create a select committee to consider the necessity of Presidential impeachment.

New York Times, 23 October 1973, sec.1, p. 33, col. 2.

Chesterfield H. Smith, then-President of the American Bar Association issued a statement including the following:

> There can be no menace to our security from within and none from without more lethal to our liberties at home and fatal to our influence abroad than this defiant flouting of laws and courts. I express my hope and confidence that the judicial and legislative forces of this nation will act swiftly and decisively to repeal and correct this damaging incursion by the President upon the system of justice, and therefore upon our basic liberties.

New York Times, 23 October 1973, sec.1, p. 47, col. 2.

It is also important to remember that it was immediately after the firing of Cox that "[f]or the first time...members of the Democratic and Republican leadership of the House of Representatives began talking publicly and seriously about impeaching President Nixon."
New York Times, 21 October 1973, sec.1, p. 1, col. 4.

Another way to view the matter is to compare the treatment of Bork (i.e., his nomination to the Supreme Court) and the treatment of the Rev. Martin Luther King, Jr., in 1963 when he was charged with contempt for having violated an injunction against his marching in Birmingham on Good Friday, even though his cause was just, even though the ordinance on which the

injunction was based was later held to be patently unconstitutional (Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)), and even though representatives from his group had previously tried twice unsuccessfully to get a permit to march, his contempt conviction was upheld by the U.S. Supreme Court because he and his co-defendants had not sought specifically to have the injunction dissolved or modified. Walker v. Birmingham, 388 U.S. 307 (1967). Bork, on the other hand, assisted President Nixon in openly defying an unappealable decision of the United States Court of Appeals, which action prompted calls for the President's impeachment. Bork was not prosecuted; instead he has been nominated for a position on the highest court in the land.

IV. CONCLUSION

If Bork is confirmed, the Senate will be saying, in effect, to the people of the United States that executive fiat is to be exalted over the rule of law--an unacceptable message at an time, but a particularly ironic one during the celebration of the Bicentennial of the U.S. Constitution.

DMS
Denominational Ministry Strategy
5707 Penn Avenue Pittsburgh, PA 15206 Phone 412/362-1712

September 15, 1987

Senate Judiciary Committee
United States Senate
Dirksen Senate Bldg. Room 224
Washington, DC 20510

Attn: Ms. Diana Huffman

Dear Ms. Huffman:

This is a formal request to be on the agenda of the Senate hearing concerning Robert Bork. The public media has heightened fears, conjecture, conspiracy theories, and paranoia, but the reality of Bork's primary backers - the Mellon-Scaife family has not yet been raised.

The testimony that we will be bringing in the form of documented evidence is of unique significance for these hearings. No private interest has had a greater financial /philosophical impact upon the Nixon and Reagan administrations than the Mellon interests of Pittsburgh and Upperville legacies. Our national art galleries are from the Mellon dynasties.

The far reaching influence of especially Richard Mellon Scaife upon extreme right wing politics is felt not only in the United States, but around the world including Central America Angola and S. Africa. The Senate must be warned of the Mellon family interests and their protective voice that will change the direction of America through their "think tank" foundations (along with Coors) that have sponsored and groomed Bork's papers. Even Scaife's own long term staff was involved with Col. North in covert actions to protect Mellon interest in the new industrial plants have been built. Bork clearly represents corporate interests for future quelling of protest and exposure of such issues.

We bring the unique world wide focus upon this hearing in the form of peaceful protest in the Pittsburgh that has been met with defrocking, and major jail sentences of 1- 2 years for misdemeanor actions. One was the receiving of a 6 month sentence for standing on the sidewalk in front of a corporate wealthy church of Pittsburgh, reading the Bible. The sentences were dealt out by Mellon backed judges with Mellon's law firm as prosecution in most cases.

These are clearly grave violations of our civil rights in acting out but because of Mellon influence in the courts of Pennsylvania, there is no chance for justice in the attempts of Mellon to quash our creative protests. The escalation of Mellon interests onto the national legal

scene brings a chilling reality to the future of freedom of peaceful protest in America and we must sound an alarm based on atrocious reprisals from Bork's backers.

We have brought world wide attention to the plight of the steelworkers and have felt the wrath of Mellon backed judges. The pattern of Mellon grooming and funding church projects is now well documented and is a dangerous involvement of the religious right into American politics. Such is the pattern backing Bork as well. This new religious-political alliance is gravely dangerous and we as American clergy must sound this alarm and warning. This focus must be raised in these hearings as most political figures already know full well of the Mellon influence on American politics. Further influence, by the Mellon-Bork control especially within our highest court must be checked before it is too late. It already dominates the local court system. With the coming unrest by downward mobility of industrial workers, farming, fishing, and textiles industries, banking corporate interests must have a way to stem any kind of protest that up until now was an American right.

Not to have this testimony at the hearings will protect the interests of the Mellon family and unfairly deprive Senators with a central perspective and issue for questioning in Bork's consideration. Strong reaction to our presence will no doubt come from Senator Heinz. Heinz has received over $1.5 million in loans for his campaign costs (just verified by the F.E.C. in writing to us) and both have major backing by Mellon interests.

One or both of us will be available for a presentation since we represent the most recent serious reaction to peaceful protest in America. We also are in the eyes of the world as we carry out the clarity of Mellon controlled courts on the local scene. The power and influence of the Mellon family is not only history through the secretary of the treasury Andrew Mellon, but currently, by his son Paul Mellon of Upperville. They may well represent the top wealth and power family for the more restrictive control in America. Bork has proven his loyalty to do as he is told and a perfect candidate for Scaife to have groomed through his foundations and no doubt relationships. Scaife is the most active Mellon in politics and was caught giving Nixon 1.2 million in small campaign gifts.

The Mellon-Bork issue must surface in this hearing. And we are prepared to testify. Not on conspiracies, or paranoia, but on reality through real life examples of power in the control of courts. This could be the gravest decision for the Senate Judiciary committee in recent American history, and fearfully the beginning of a new oppression and thwarting of the freedom of speech and expression from the banking-religious alliance.

We pray that you will place one of us on the agenda.

Thank you

Rev D. Douglas Roth Rev Daniel N. Solberg

Rev. D. Douglas Roth and Rev. Daniel N. Solberg

Enclosures cc: Senate, Release

DMS
Denominational Ministry Strategy
5707 Penn Avenue Pittsburgh, PA 15206 Phone 412/362-1712

enate Judiciary Committee
nited States Senate
irksen Senate Bldg. Room 224
ashington, DC 20510

October 7, 1987

ttn: Ms. Diana Huffman

ear Ms. Huffman:

n September 15, 1987 we submitted a letter and had enclosed evidence in
pposition to nominee Robert Bork for Supreme court justice of the
nited States. We assumed that that material would be part of official
ecord in the Bork case and so request.

e testimony that we requested was concerning the fact that the Mellon-
caife family had not yet been raised in the hearings.

st week, we received a phone call from your office notifying us that
r evidence would be accepted in writing as opposing Robert Borks
commendation. We accept this offer and as mentioned, assumed that our
st letter and evidence had been included, but if not we ask that it be
cluded in the official record as in opposition to Robert Bork. Please
bmit the evidence contained in our Sept 15, 1987 letter to you. Thank
u very much for your follow up and admission of our materials.

wanted to be sure the senate, even at this stage has our material on
nd even if it is used in the future for study. As you may know we had
livered some (but not all of that submitted to you) of our material to
ch senators office personally. But the research that we enclosed to
u is of unique significance for these hearings and later review. No
ivate interest has had a greater financial /philosophical impact upon
e Nixon and Reagan administrations than the Mellon interests of
ttsburgh and Upperville legacies. Our national art galleries are from
e Mellon dynasties.

e latest example is the fact that Mellon Bank has been in serious
ouble. All of a sudden it has been announced that Mellon will receive
substantial amount of business from the Federal Government. A must
ique type of bailout and obviously took considerable power to deliver.

far reaching influence of especially Richard Mellon Scaife and Paul
lon upon extreme right wing politics is felt not only in the United
tes, but around the world including Central America, Angola and S.
ir protective voice that will change the direction of America through
ir protege, Robert Bork or someone of his nature. Scaife is the
hest contributor to the "think tank" foundations (along with Coors)
t have sponsored and groomed Bork's papers. Even Scaife's own long
m staff was involved with Col. North in covert actions to protect
lon interest in the new industrial Central America, where bank loans
now collapsing and third world plants have been built. Bork clearly

represents corporate interests for future quelling of protest and exposure of such issues and we have been pleased to see his recommendation thus far turned down.

It should also be noted that Rev. D. Douglas Roth now has a case before the Supreme Court of the United States concerning his 6 month jail sentence for merely reading the scripture on a public sidewalk in front of Pittsburgh's richest corporate church. Shadyside Presbyterian where Mellon interests and Senator John Heinz's family are long term members.

On behalf of all of us, please submit all of our materials as official part of your records in opposition to Robert Bork. Thank you.

Thank you

Rev. D. Douglas Roth, Rev. Daniel N. Solberg, and Charles L. Honeywell

THE REV. DR. PHILIP D. LONG, B.D., Lutheran Theological Seminary, Philadelphia, M.A. University of Pennsylvania, Ph.D., University of Pittsburgh, Lutheran
THE REV. DR. GALE E. TYMESON, M.Div., Union Theological Seminary , Ph.D., University of Pittsburgh, United Church of Christ
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THE REV. BETH L. SIEFERT, M.Div., Lutheran Theological Seminary, Gettysburg, M.Theological Studies, Harvard Theological Seminary, Lutheran
THE REV. DANIEL N. SOLBERG, M.Div., Yale University, Lutheran
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THE REV. DONNA J. KYLLONEN, M.A., Georgetown University, M.Div., Lutheran Theological Seminary, Gettysburg, Lutheran
THE REV. FATHER JOHN J. CASSELLA, B.A.,M.Div.,Saint Vincent Seminary, Roman Catholic
THE REV. PAUL L. HIMMELMAN, M.Div., Northwestern Theological Seminary, Lutheran
THE REV. JOHN J. GROPP, M.Div., Lutheran Theological Seminary, Gettysburg, Lutheran
REV. DAVID HONEYWELL, B.A., Bryan College, Dayton Tennessee, American Baptist
MR. CHARLES L. HONEYWELL, B.S.,M.A., Western Michigan University. Lutheran
MARY ANNE YOST, Former Synod Coordinator of planning and communications, Lutheran
DARRELL BECKER President, International Union of Marine and Shipbuilder workers of America, Local 61., Lutheran

Hundreds, nationally as well as locally, support this group and ministry.

★★★ DISTRICT OF COLUMBIA

DEMOCRATIC STATE COMMITTEE
3636 Sixteenth Street, NW, Suite AG-65 • Washington, DC 20010 • (202) 289-4061

mes M. Christian, Sr.
Chairman

September 18, 1987

The Honorable Joseph R. Biden
Chairman
Senate Committee on the Judiciary
United States Senate
489 Senate Russell Office Building
Washington, D.C. 20510-0801

Dear Senator Biden:

Enclosed you will find a Resolution of the District of Columbia Democratic State Committee in opposition to the confirmation of Judge Robert Bork as an Associate Justice of the United States Supreme Court. We respectfully request that this Resolution be made a part of the record of Judge Bork's confirmation hearings.

Sincerely,

JAMES M. CHRISTIAN, SR.
Chairman

Enclosure

★★★ DISTRICT OF COLUMBIA

DEMOCRATIC STATE COMMITTEE

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Barbara W. Garnett
Executive Director

RESOLUTION

The District of Columbia Democratic State Committee adopts the following resolution:

WHEREAS, the President of the United States has ill-advisedly nominated Judge Robert Bork, Court of Appeals of the District of Columbia Circuit, to replace Justice Lewis Powell on the United States Supreme Court; and,

WHEREAS, as evidenced in opinions that he has authored while a member of the United States Court of Appeals for the District of Columbia Circuit and in other commentaries, Judge Bork strongly supports, promotes, and follows an unacceptable and deeply conservative ideology that would unwisely and profoundly alter widely accepted Supreme Court decisions on abortion, affirmative action, church and state issues, and the death penalty for juveniles; and,

WHEREAS, the jurisprudential ideology of Judge Bork if permitted to permeate the Supreme law of the land would be antithetical to the hopes, aspirations and legitimate interests of major segments of American Society; and,

WHEREAS, Judge Bork has demonstrated a callous insensitivity to the requirements of the United States Constitution when he as Acting Attorney General in 1973, fired Archibald Cox, the first Watergate special prosecutor; and,

WHEREAS, Judge Bork's jurisprudential ideology parallels President Ronald Reagan's unacceptable political thinking and if adopted would require women to face danger laden abortion choices, place the civil rights of Black Americans and other minorities in precarious jeopardy and give license to unacceptable law enforcement practices; and,

WHEREAS, the People of the United States have rejected both Judge Bork's jurisprudential ideology and Ronald Reagan's political thinking by electing a more sensitive and compassionate Democratic majority in the United States Senate; and,

WHEREAS, under the Constitution of the United States, the Senate is a branch of government of comparable station to the Executive Branch when the Senate performs its "advise and consent" function; and,

WHEREAS, the Senate has the constitutional right and the duty to evaluate and judge the jurisprudential ideology of a Supreme Court nominee when it exercises its "advise and consent" powers,

THEREFORE, BE IT RESOLVED, that the District of Columbia Democratic State Committee does hereby express its unequivocal opposition to the confirmation of Judge Robert Bork as an Associate Justice of the United States Supreme Court; and

BE IT FURTHER RESOLVED, that the District of Columbia Democratic State Committee implores and respectfully requests the Democratic Majority and other sensitive and compassionate members in the United States Senate not to confirm Judge Robert Bork as an Associate Justice of the United States Supreme Court.

DISTRICT OF COLUMBIA DEMOCRATIC STATE COMMITTEE

By: James M. Christian, Sr.
JAMES M. CHRISTIAN, SR.
Chairman

Morris J. Eisen, P.C.

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**WASHINGTON, D.C. & CT. BARS
‡WASHINGTON, D.C., N.Y. & FLA. BARS

OF COUNSEL

MORTON J. LEVINE
RICHARD WEISS
MORTEN FEDER
ROY SCAFFIDI

WRITER'S DIRECT DIAL
212-341-8

October 2, 1987

Honorable Joseph Biden
United States Senate
Washington, D.C. 20510

Re: Robert Bork

Senator Biden:

I am an opponent of the proposed appointment of Judge Bork to the United States Supreme Court. I, and a colleague of mine, Cheryl Bulbach, have passed a petition opposing the appointment of Judge Bork to the Supreme Court to New York State Lawyers, as well as a seperate petition to non lawyer New York State residents.

Approximately 75% of the attorneys I asked to sign the petition, agreed to sign it. Among the signers is Herman Glaser, a past president of the New York Trial Lawyers Association.

I am enclosing the petitions. I hope they will aid you in your fight against the appointment of Judge Bork to the Supreme Court. Copies of the Petitions are being sent to the Honorable Patrick Moynihan and the Honorable Alphonse D'Amato.

Sincerely,

MORRIS J. EISEN, P.C.

By: Mitchell R. Drach

Mitchell R. Drach

MRD/pcn
enc

cc: Honorable Alphonse D'Amato
Honorable Patrick Moynihan

September 30, 1987

Honorable Paul Simon
United States Senate
Washington, DC 20510

Dear Senator Simon:

Since Rabbi Haberman's letter to the Post has been read into the record, you should have (may be also included in the Record) this piece by Dr. Ken Dean about the same Brookings speech. We, too, were there. Ken Dean's account is far more accurate.

Sincerely,

James Dunn
Executive Director
Baptist Joint Committee
on Public Affairs

Dr. Gordon Harris
North American Baptist
Theological Seminary
Sioux Falls, South Dakota

Rev. Wes Forsline
St. Paul, Minnesota

Dr. Phil Wogaman
Wesley Theological
Seminary
Washington, DC

Times-Union, Rochester, N.Y. 8-19-87 8A

Bork thrives on confrontation, lives for the spotlight

By REV. KENNETH DEAN

You would expect that a possible nominee to the U.S. Supreme Court who is meeting with 30 or so clergy of the three major faiths would present himself as a sage of the law, as a politically astute gentleman or at least as a patriot of good will.

Not Federal Judge Robert Bork, in a meeting at the Brookings Institution in the fall of 1985. He came on as a crusader sprinkling verbal acid in the faces of his shocked listeners. In a 30-minute speech and about an hour of discussion, he created a verbal brawl about the role of religion in American society.

IT WOULD BE difficult to say which was more provocative, Bork's style or his content. He began by calling attention to his tobacco addiction and said he was going to puff even as he lectured. He stated that while he came from a mildly religious family, he personally claimed no faith commitment. He wanted us to know that his opinions were based on what he thought was best for the country and not on something he practiced.

Despite his disclaimer of personal faith, Bork then embraced the New Right's perspective on American society and the need for a new wedding between church and state. He said John Richard Neuhaus, author of *The Naked Public Square*, had shaped his thinking.

He emphasized Neuhaus' concern that when a house is swept clean of one demon, it may then become inhabited by seven demons. He identified with the Neuhaus thesis that religion in America (meaning the mainline Protestant church) has fallen on hard times and left an ethical void. This has opened the door for a demon — secular humanism. In theory, this demon is shared with communist countries which, like America, are secular states.

Problematic to the thesis which Bork shares with the sectarian right wing religionists is the fact that most of them opposed the racial progress, civil rights legislation and poverty program efforts of the 1960's and early 1970's. Indeed, Neuhaus is considered by moderates as a turncoat, because before his conversion he sought to move in the spotlight of social change for more than two decades.

Bork has needed to make no change, for his record includes a long list of positions in opposition to racial progress and civil rights. He is considered the architect of Sen. Barry Goldwater's racial resistance platform for the presidency in 1964.

MODERATE RELIGIOUS leaders perceive the social programs of the 1960s and 1970s as a divine movement toward justice, while sectarian conservatives tie the values of a permissive society with the continuing pathology of social poverty to create a new demon — secular humanism.

At the heart of this controversy and fear is the Supreme Court decision striking down public school segregation. Following this decision, the Southland was dotted by billboards decrying the decision as communistic influence, and some of those billboards still remain. The overarching issue for the New Right religious sectarians is education, and it is they who have built a nationwide network of independent, mostly segregated, religious-dominated academies.

In Robert Bork they believe they would have an advocate and a majority vote-maker on the Supreme Court. Through federal aid to the private religious academies, they hope to regain power over education and reinstate a mostly segregated dual system of private and public education paid for by federal and state governments.

These right-wing sectarians have welded together a collection of interests that usually go separate ways. Included are right wingers who want to regain control of education, parochial school supporters who claim a right to the federal and state dollar, and Orthodox Jews who in the face of growing alliance between American blacks and the Moslem world, have traded their support for liberal programs for right wing support for Israel.

THE MEETING of clergy and Judge Bork turned into a hostile exchange as these issues began to surface. Bork was told of the embarrassment and conflict experienced by an eighth grade student in Cocoa Beach, Fla., who was instructed by his Jewish parents not to read the Bible or lead prayer in classroom devotions dominated by Christians (the youth's alternative was to stand in the hallway). Bork responded, "Well, I suppose he got over it, didn't he?"

Bork said that as a youngster he had been exposed to a religious tradition other than his own and that it did not seem to do him any harm.

The Bork who disclosed himself to the clergy was a man of calloused attitude toward the individual, indifference toward the minority, and a crusader against the demons whom he believed were about to take up residency in American government.

Bork rounded out his position in favor of government funds for private education by citing a number of Supreme Court decisions that to him were excessive. He also claimed that present interpretations exceed the original intent of the framers of the Constitution. The response was a barrage of comments to the effect that the original framers also supported slavery and failed to recognize women.

AS IMPORTANT as these issues are, one must look beyond this session and the judicial record to form an accurate picture of Bork. In his late youth Bork supported left-wing causes. As a corporate lawyer, he was something of a rebel in his firm. He later became a libertarian and a conservative gadfly on the faculty at Yale Law School. These attributes led him to the office of solicitor general, there to accept President Nixon's order to fire special Watergate prosecutor Archibald Cox in the Saturday Night Massacre.

In a sense, Bork's career record is in conflict with his posture as a Supreme Court nominee. The career has seen turns and change. Most of his more pronounced changes in political philosophy have been occasioned by vocational moves.

One concludes that the real Bork is unpredictable and that his thought moves in circles. His personality seems to thrive on confrontation and argument, and he is prone to do things to capture the center stage.

In Bork, one finds a person who is to law and the Supreme Court what Lt. Col. Ollie North was to the White House and the National Security Council.

There is a lot of room in the field for such characters, and they contribute to the public dialogue, but they can be dangerous in key positions where policy is established and law is interpreted.

The primary assumption of Bork in his revelation to the clergy was fear. When he translates this fear into public policy and law, the result is a shrinking of the spirit of liberty and trust in public institutions. Out of their fear of demons, Bork and his New Right advocates hold to a static view of history and distrust the continuing American experiment.

The writer is pastor of First Baptist Church of Rochester, in Brighton.

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STATEMENT OF

THE EXECUTIVE LEADERSHIP COUNCIL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

THE NOMINATION OF ROBERT H. BORK

TO BE AN ASSOCIATE JUSTICE ON

THE UNITED STATES SUPREME COURT

OCTOBER 9, 1987

Suite 715 • 444 North Capitol Street • Washington, D.C. 20001 • (202) 783-6339

I. INTRODUCTION

The membership of the Executive Leadership Council would like to express their appreciation to the Chairman and the Committee for inviting us to present our views regarding the appointment of Robert Bork to the United States Supreme Court. We would like to submit the following written testimony to the Committee and request that it be included into the record.

The Executive Leadership Council is an organization comprised of a number of the highest ranking Black male and female Corporate executives from some of the largest corporations in the United States. The diverse membership of the Council represents virtually every business, industry, and service sector in the United States. While we enjoy a rich diversity of interests and expertice, we have joined together for the mutual purpose of preserving and promoting the competitive strength of Black executives and American business interests by creating a leadership forum for developing positions on business, economic, and public policy that positively impact business growth and advance minority economic development.

Attaining a position of corporate responsibility is difficult for all aspirants. As Black executives, the members of the Council have been confronted by the same obstacles that confront all other competitors in addition to confronting a distinctive set of challenges and obstacles. The members of our organization have worked extraordinarily hard to reach positions of significant corporate authority and to compile outstanding records of performance and accomplishment individually and collectively. The members of the Council have demonstrated that competency, performance, ability and creativity have no color. By almost any standard, they are considered successful.

Our views are not motivated by anger or frustrations often associated with frustrated opportunities. Our membership spans the political spectrum including conservatives, moderates, liberals, Republicans and Democrats. We are not legal, academic, or political theorists. Our views are shaped by real world experience rather than theory. Our concerns, like the concerns of most business executives, include economic, fiscal and tax issues; national and international trade policies; bond and equity markets; organization realignments; and market opportunities and trends.

Today, we would like to share our unique insights and to express our grave concerns about the impact that the appointment of Robert Bork to the Supreme Court could have on the current uncertain status and future advancement of Black managers and executives in America's corporations.

II. HISTORICAL ROLE OF THE SUPREME COURT

> "What is striking is the role legal principles have played throughout America's history in determining the condition of the Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law."
>
> -Thurgood Marshall
> May, 1987

Recognizing the fact that a great number of American citizens were arbitrarily being denied equal access to employment, Congress passed into law the Civil Rights Act of 1964. While the passage of the law prompted reform of unfair employment practices, discrimination in the workplace persisted. It fell upon the Supreme Court to become the ultimate guardian of the right of Blacks to have fair access to employment.

A year before the enactment of the Civil Rights Act, the Supreme Court judicially recognized, in the unanimous decision Colorado Anti-Discrimination Comm. v. Continental Airlines (372 US 714 (1963)), that employment discrimination on the basis of race was illegal under the equal protection clause of the 14th amendment. Thereafter, in dozens of cases, the Supreme Court applied the standards and principles of the equal protection clause of the 14th amendment to affirm the basic constitutional right for Black Americans to be afforded equal employment opportunity.

Between 1971 and 1979, the Supreme Court decided landmark cases which ruled many existing business practices to be illegal. Preemployment tests and requirements unrelated to job performance that unfairly affected Blacks were held illegal in the unanimous Griggs V. Duke Power (401 US 424 (1971)) decision and again in Albemarle Paper Co v. Moody (422 US 405 (1975)). Layoff procedures based on seniority that unfairly affected Blacks were struck down as illegal in Franks v. Bowman Transportation Co., Inc. (424 US 747 (1976)). And in a truly significant decision, Weber v. Kaiser Aluminum & Chemical Corp. (443 US 193 (1979)), the Supreme Court ruled affirmative action plans that

reserved a percentage of employee openings for Black applicants to eliminate a manifest racial imbalance to be legal and constitutional.

The Supreme Court has upheld its promise to provide "Equal Justice Under Law" and has made it possible for Black men and women such as ourselves to have the opportunity to compete and perform in the corporate workplace. We cannot overlook the fact that if assertive action had not been taken by the Supreme Court, then regardless of our stellar individual qualifications, it is improbable that any of us would have had the opportunity to demonstrate that Black Americans can function effectively as responsible corporate executives.

III. CURRENT STATUS OF BLACK EXECUTIVES.

While our very existence symbolizes America's progress toward achieving a reality of equal opportunity, our sparse numbers also demonstrates the continuing embedded resilience of unequal access. Despite the efforts of the courts, our members, if not unique, are nevertheless disproportionately scarce. A burning issue that must not be ignored is why there are not more Black executives. Why are there not more of us after over two decades of equal opportunity being the law of the land?

At present, confusion and misunderstanding about the current status and progress of Black managers and executives is rampant. A 1986 Rand Report titled "Closing The Gap" argues against affirmative action and states:

> "the real prizes in our economic race are won in the private sector, and the Black elite have now joined the game... there is now substantial evidence that salary increases and promotions for the Black elite will be at least as rapid as for their white competitors".

There is ample evidence that refutes this interpretation of the current reality of Black executives. According to statistics presented in the 1984 EEO-1 report, compiled by noted business consultant Mr. Ed Jones and submitted to Congress by him in testimony before the House Committee on Education and Labor during August, 1986:

> "From 1966 through 1984, there was a growth of over 1.6 million managers. Black males only constituted 9% of all [non-white male] managers, yet they accounted for almost 60% of the total [number] loss among [non-white male] managers from 1982 to 1984."

Contrary to what some may claim, empirical studies and our own experience indicate that color continues to be a critical impediment to access for Black Americans. Racially motivated discrimination in the workplace continues and as long as the under-utilization and under-representation of talented Blacks in all levels of corporate management persists, affirmative action will be necessary to at least ensure fair and equal treatment.

This reality requires a reaffirmation of our national policy of equal opportunity employment. We must strengthen, not lessen our efforts to remove unnecessary barriers to employment.

IV. JUDICIAL PHILOSOPHY OF ROBERT BORK

Because the Supreme Court has played such a critical role in defending the rights of Black Americans, and because Black executives are in ever shrinking numbers, and because of the publicly expressed views of Robert Bork, the members of the Executive Leadership Council are greatly concerned about the nomination of Robert Bork to become Associate Justice on the United States Supreme Court.

Robert Bork has repeatedly and publically presented his views in opposition to the constitutionality of the preferential treatment equal opportunity laws have afforded Blacks and other minorities to compensate for individual and institutional discrimination. His judicial philosophy of strict interpretation of the "original intent" of the Framers of the Constitution is clearly hostile towards the reforms generated by equal opportunity laws.

In 1971, when the Supreme Court handed down the Griggs decision, Robert Bork published an article in Fortune Magazine entitled "We Suddenly Feel that Law is Vulnerable" (Fortune, December 1971. p. 117) wherein he commented about his attitude towards reform laws aimed at corporations:

> "...law intrudes in the decisional processes that are better left to managerial discretion, and so renders institutions less effective..."

He added:

> "We need more thought and greater sophistication about the kinds of issues and decisions that can profitably be referred to formal legal processes and the kinds that ought to be left to other processes." "Many of the results the [Warren] Court reached were...politically and socially desirable. But that does not begin to justify their imposition by a court acting on no existing legal grounds."

At the time Griggs was decided, no legal precedent protecting qualified Black employment applicants from discriminatory job selection requirements existed. It is apparent from his comments that Mr. Bork felt that the Supreme Court should not have established the legal precedent in Griggs, regardless of the social evil it was addressing, because there was, in his view, "no legal ground" upon which to base this decision. In the same article, Bork further states:

> "Groups feel themselves set apart and requiring the protection of law from what is perceived as the hostility of strangers...It makes little difference that the distrust is usually without objective justification."

What Robert Bork considered to be "perceived...hostility" without "objective justification", the Supreme Court considered ample evidence of a clear violation of the equal protection clause of the 14th amendment of the Constitution. So compelling was the evidence, the Court voted unanimously. The fact that Mr. Bork questions the legal principle of such an important decision is deeply troubling.

In 1977, Mr. Bork continued his criticism of Supreme Court decisions that upheld the constitutional right of Blacks to have equal access to employment. Mr. Bork, in a speech before the American Enterprise Institute, severely criticized the top management of America's largest corporations for compliance with the rules of law set out by the Supreme Court.

> "...the leaders of the major American corporations... [are] docile, apprehensive, defensive, and unsure of how to respond to sharp and unrelenting attacks...the business executives, appear so timid in confronting the hostility, criticism and demands for misguided reform directed toward them and the institutions they head."

Frighteningly, Mr. Bork's stated opinion is that corporate America should contemptibly view the laws which sought to eliminate artificial, arbitrary, and unnecessary barriers which discriminated against Blacks and other minorities as "misguided reform".

Mr. Bork continued his ferocious attack on America's top corporate managements in the same speech, stating:

> "It is as though a large fraction of the community of business leaders wants to make preemptive concessions, ...not to plan a fight against a wrongheaded movement but to discuss how best to negotiate the terms of surrender. That attitude,...an expressed willingness to make unwise changes in order to be accepted,

> ...will be seen as weakness and will only earn the contempt of the enemies of corporations and capitalism. No one will respect institutions whose leaders must be convinced that legitimacy and moral authority are not gained by giving in to demands for 'reform' they know will lessen the ability of corporations to produce goods and services..."

It is clear that Robert Bork feels that allowing Blacks equal access to employment "will lessen the ability of corporations to produce goods and services," removing unfair barriers is "a wrongheaded movement", and that affirmative action is an "unwise change".

Robert Bork's philosophy that corporate "reforms" having specific impact on targeted social groups is detrimental to American business is long standing and was widely disseminated. In the Wall Street Journal of October 22, 1977, Mr. Bork wrote:

> "A result of allowing preferences to any disadvantaged minority might precipitate an ugly self-consciously racial and ethic politics as groups struggle for limited resources in a zero sum game."

In the same article Bork comments:

> "All preferences granted or denied [to social classes] would be subject to constitutional review and the courts would face the preposterous task of checking the disadvantagement credentials of every group that won preferences, and under the equal protection principle, requiring that every such group be given preferences if any was. The Constitution would be converted into a complex racial and ethnic code, surely a sad, ironic end to the civil rights movement."

The "sad and ironic end to the civil rights movement" and the "ugly self-consciously racial and ethic politics" anticipated by Mr. Bork has failed to materialize. Yet the chilling implications of Mr. Bork's reasoning linger menacingly.

V. CONCLUSION

Mr. Bork suggests that the severity of these publicly stated opinions be dismissed on the grounds that he was being academically provocative. The members of the Council believe that these comments should not be dismissed on any grounds. These inflammatory comments made by Robert Bork in the business environment causes lasting concern to those of us who truly cherish the concept of equal opportunity under the law.

In case after case, the Supreme Court has viewed the 14th amendment as a statement of freedom in America, a challenge against the subordination of

Black people in the country. Robert Bork has consistently rejected the concept that the Constitution is a charter of liberty and instead prefers to interpret its meanings technically. As Senator Howard Metzenbaum so eloquently stated during Mr. Bork's testimony before the Committee:

> "...you're a man with frightening views. The basic problem, as I see it, is that to you, the Constitution is not a living document...and if you can't find protection for the individual in the fine print, then the people of this country are out of luck."

The members of our organization share Senator Metzenbaum's sentiments. We feel that Robert Bork's judicial philosophy is morally indefensible and legally unsound. For over twenty years, the United States Supreme Court has been the guardian of the rights of all of America's Blacks to gain equality in the workplace. If appointed to the bench, there is every indication that Robert Bork would be completely insensitive to the need of ensuring equal opportunity under the law.

Robert Bork has asked Members of the Senate and the American people to judge him solely on his record as a Circuit Court Judge and as Soliciter General. Overlooked is the fact Robert Bork was significantly constrained in these previous positions. As a Supreme Court Justice, Mr. Bork would be absolutely answerable to no one. An unaccountable Robert Bork on the Supreme Court would pose an unqualified threat to the continued application and development of the Constitutional protections and freedoms that guarantee employment equality for America's Black citizens.

Our organization is very uncomfortable with the possible future of America if Robert Bork is confirmed. What will the future hold if America's best educated and best prepared Blacks are denied a fair opportunity to compete? What will happen to the hopes and dreams for a better life of America's Black children, living in the urban jungles, surrounded by crime, drugs, poverty and despair, if the best prepared Blacks are denied access to success? What will be the future of justice in America?

Will Robert Bork listen impartially to the requests for justice voiced by the citizens of the country? Will Robert Bork apply justice in a fair and equitable and unbiased manner? Or will Robert Bork endeavor to develop a smooth, articulate, intellectual argument to narrow the meaning of the Constitution as he sees fit, regardless of whether justice was served? Mr.

Bork's writings are a clear indication of his intent and America cannot afford to believe in Robert Bork's concept of justice.

We are Black executives succeeding in the corporate environment. Collectively, we are responsible for hundreds of millions of dollars of corporate assets. And while the "reform" of affirmative action has helped many of us, not one of us has impaired our respective corporation's "ability to provide goods and services," as Robert Bork feared.

We believe that Black men and women should have unlimited opportunity based on fairness, or equal opportunity does not exist. Robert Bork is opposed to this philosophy and we, as a group, are opposed to his confirmation to the United States Supreme Court.

We respectfully request that the Senate of the United States Congress votes to reject this appointment to the highest court in the nation.

Thank you for the consideration of our views.

[4510-26-M]

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Occupational Exposure to Lead

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final Standard for Occupational Exposure to Lead.

SUMMARY: This final standard limits occupational exposure to lead to 50 $\mu g/m^3$ (micrograms per cubic meter) based on an 8 hour time-weighted average. The basis for this action is evidence that exposure to lead must be maintained below this level to prevent material impairment of health or functional capacity to exposed employees.

Provisions for environmental monitoring, recordkeeping, employee education and training, medical surveillance, medical removal protection, hygiene facilities, and other requirements are also included in the standard.

DATES: Effective date: February 1, 1979. Startup dates for individual provisions which are different than the effective date are in paragraph (r) of the regulation.

FOR FURTHER INFORMATION CONTACT:

Gail Brinkerhoff, OSHA Office of Compliance Programs, U.S. Department of Labor, Room N-3112, Washington, D.C. 20210, telephone 202-523-8034. For additional copies of this regulation, contact: OSHA Office of Publications, U.S. Department of Labor, Room N-3423, Washington, D.C. 20210, telephone 202-523-8677.

SUPPLEMENTARY INFORMATION:

I. Introduction

The statement of reasons accompanying this regulation (the preamble) is divided into six parts, numbered I through VI. The following table sets forth the contents of the preamble:

I. Introduction.
II. Pertinent legal authority.
III. Executive summary.
A. Health effects of lead exposure.
B. Permissible exposure limit.
C. Medical removal protection.
D. Feasibility of compliance.
IV. Explanation of the standard.
V. Authority and signature.
VI. Attachments.
A. Health effects of lead exposure.
B. Permissible exposure limit.
C. Medical removal protection.
D. Feasibility.

Part VI of the preamble is divided into four attachments (A-D) (to be published separately in the FEDERAL REGISTER on or about November 21, 1978) which provide a detailed, complex, and technical discussion of the evidence and OSHA's conclusions on most of the major issues raised in the rulemaking. Part III is a brief, nontechnical summary of these attachments and is intended for the reader who wishes to understand the basis for OSHA's conclusions in this standard without having to examine the more technical attachments.

Part IV is a provision-by-provision discussion of the regulation in lettered paragraphs corresponding to the lettered paragraphs of the regulation. It provides a brief summary of each provision and the evidence and rational supporting it. This is followed by part V, which in turn is followed by the regulation and its appendices.

References to the rulemaking record in the text of the preamble are in parentheses, and the following abbreviations have been used:

1. Ex.: Exhibit number.
2. Tr.: Transcript page number.
3. Ref.: Reference number.
4. Att.: Attachment number or letter.
5. App.: Appendix number or letter.

This permanent occupational safety and health standard is issued pursuant to sections 6(b) and 8(c) of the Occupational Safety and Health Act of 1970 (the Act) (84 Stat. 1593, 1599, 29 U.S.C. 655, 657), the Secretary of Labor's Order No. 8-76 (41 FR 25059) and 29 CFR Part 1911. It amends Part 1910 of 29 CFR by adding a new § 1910.1025, entitled "Lead," and by deleting the reference to "lead and its inorganic compounds" in Table Z-2 of 29 CFR 1910.1000. The standard applies to employment in all industries covered by the Act except construction and agriculture.

Pursuant to section 4(b)(2) of the Act, OSHA has determined that this standard is more effective than the corresponding standards now applicable to the maritime industries currently contained in Subpart B of Part 1910, and Parts 1915, 1916, 1917, and 1918 of Title 29, CFR. Therefore, those corresponding standards are superceded by the new lead standard in § 1910.1025. A new paragraph (g) is added to § 1910.19 to clarify the applicability of this new lead standard to the maritime industries.

A. Background

Lead (Pb) occurs naturally in the Earth's crust and is also found in the atmosphere and hydrosphere. It has been used for thousands of years because of its availability and desirable properties. Even in early times, there was recognition of health hazards associated with its use, both as a metal or in a compound form. Thus it was found that lead could be absorbed by inhalation and ingestion and that lead absorption was responsible for loss of movement in printers' fingers exposed to heated lead type and for "dry grippes" in pottery and glass workers.

By the early 20th century, studies revealed that the absorption of excessive quantities of lead (lead intoxication or plumbism) caused diseases of the kidney and peripheral and central nervous systems. For example, an analysis of death rates in the United Kingdom in 1921 (Ex. 5(1)) and 1931 (Ex. 5(2)) showed a considerable excess of deaths due to nephritis and cerebrovascular disease in plumbers and painters.

In excess of 1 million tons of lead are consumed yearly by industries in the United States. Potential occupational exposure to lead and its compounds occur in at least 120 occupations, including lead smelting, the manufacture of lead storage batteries, the manufacture of lead pigments and products containing pigments, solder manufacture, shipbuilding and ship repairing, auto manufacturing, and printing.

B. History of the Regulation

Although the prevalence of lead intoxication in ancient times has been the subject of some speculation, it seems likely that there was a lack of appreciation of the hazards of lead and preventive methods of limiting exposure until recent times. Modern tests for estimating lead exposures, such as measurements of urinary and blood lead levels, urinary coproporphyrin and delta-aminolevulinic acid (ALA), have been generally used to establish acceptable air lead levels and thereby to control occupational lead intoxication. At one time, an airborne exposure limit value of 500 $\mu g/m^3$ was generally accepted. Based on a recommendation of the U.S. Public Health Service in 1933, however, a value of 150 $\mu g/m^3$ was a common goal in industry in the 1940's.

150 $\mu g/m^3$ continued to be the most often accepted until 1957, when the American Conference of Governmental Industrial Hygenists (ACGIH) increased the value to 200 $\mu g/m^3$. In 1971, however, ACGIH recommended lowering this exposure limit back to 150 $\mu g/m^3$. (Ex. 5(3).)

The present occupational safety and health standard for "lead and its inorganic compounds" is found in Table Z-2 of 29 CFR 1910.1000 and was adopted in 1971 pursuant to section 6(a) of the act. The permissible exposure limit, which is 200 $\mu g/m^3$ as determined on the basis of an 8-hour time-

Submitted for the record by Senator Metzenbaum

weighted average, was based on a national consensus standard of the American National Standards Institute (Z37.11-1969). When the consensus standard was originally adopted, no rationale was provided for the level selected.

In January 1973, pursuant to section 22(d) of the Act, the Director of the National Institute for Occupational Safety and Health (NIOSH) submitted to the Secretary of Labor a criteria document for inorganic lead, which recommended, among other things, lowering the existing permissible exposure limit for lead from 200 $\mu g/m^3$ to 150 $\mu g/m^3$ (Ex. 1.)

On August 4, 1975, the Director of NIOSH forwarded a letter to the Deputy Assistant Secretary of Labor for Occupational Safety and Health which revised the recommendations in the criteria document. In it, he recommended that the permissible exposure limit for airborne concentrations lead be reduced from 150 $\mu g/m^3$ to lower ranges. This letter followed a joint effort by the staffs of both OSHA and NIOSH to analyze and review scientific data not available or relied upon in the original criteria document and which resulted in a reevaluation of earlier recommendations.

On October 3, 1975, OSHA proposed a new occupational safety and health standard for occupational exposure to lead (40 FR 45934) (Ex. 2). The proposal included a permissible exposure limit of 100 $\mu g/m^3$ combined with provisions for environmental monitoring, medical surveillance, employee training and other protective measures. The notice requested submission of written comments, data, and opinions.

In a notice published on January 4, 1977 (42 FR 808) (Ex. 21), OSHA announced the availability of the preliminary technological feasibility and economic impact statements prepared by John Short Associates. It also gave notice that an informal hearing would begin in Washington, D.C. on March 15, 1977. On February 15, 1977 (42 FR 9190) (Ex. 25) notice was given that the final economic impact statement was available to the public and that the economic impact had been certified pursuant to Executive Order 11821.

In publishing the proposal, OSHA noted its intention to prepare an Environmental Impact Statement to assess the effect of the proposed standard on the human environment. Interested parties were invited to submit comments that would be useful in preparing a draft of the Environmental Impact Statement. On February 25, 1977, the availability of OSHA's draft of the Environmental Impact Statement on the Proposed Lead standard was announced by the Council on Environmental Quality (42 FR 11036) (Ex. 30).

In a FEDERAL REGISTER notice on March 8, 1977, OSHA announced that in addition to the March 15, 1977 hearing in Washington, D.C., two regional hearings would be held (42 FR 13025). The first regional hearing began on April 26, 1977, in St. Louis, Mo., and the second regional hearing began on May 3, 1977, in San Francisco, Calif. During the hearing in Washington, D.C., which lasted 7 weeks, OSHA presented 15 expert witnesses from around the world to discuss various aspects of the proposal. In addition to witnesses invited by OSHA, NIOSH, and approximately 50 public participants testified. In St. Louis, 9 public parties testified; in San Francisco, 13.

The hearing record was reopened by OSHA on September 16, 1977, for the purpose of taking additional evidence on the issue of medical removal protection. A FEDERAL REGISTER notice was published giving notice that a hearing would be held on November 1, 1977 (42 FR 46547) (Ex. 353). A hearing was held (November 1 through 11, and December 22, 1977) and additional exhibits were added to the record including an OSHA-sponsored study on labor costs for implementation of medical removal protection (Ex. 439).

Final certification of the hearing record was completed on August 8, 1978, by Administrative Law Judges Julius J. Johnson and Garvin Lee Oliver.

II. PERTINENT LEGAL AUTHORITY

The primary purpose of the Act is to assure, so far as possible, safe and healthful working conditions for every working man and woman. One means prescribed by Congress to achieve this goal is the authority vested in the Secretary of Labor to set mandatory safety and health standards. The standards setting process under section 6 of the Act is an integral part of an occupational safety and health program in that the process permits the participation of interested parties in consideration of medical data, industrial processes and other factors relevant to the identification of hazards. Occupational safety and health standards mandate the requisite conduct or exposure level and provide a basis for insuring the existence of safe and healthful workplaces.

The Act provides that:

> The Secretary in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.
>
> Development of standards under this subsection shall be based on research, demonstrations, experiments, and other such information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws (Sec. 6(b)(5)).

Sections 2(b) (5) and (6), 20, 21, 22, and 24 of the Act show that Congress recognizes that conclusive medical or scientific evidence including causative factors, epidemiological studies or dose-response data, may not exist for many toxic materials or harmful physical agents. Nevertheless, final standards cannot be postponed because definitive medical or scientific evidence is not currently available. Indeed, while standards are to be based on by the best available evidence, the legislative history clearly shows that "it is not intended that the Secretary be paralyzed by debate surrounding diverse medical opinion." House Committee on Education and Labor (Rept. No. 91-1291, 91st Cong., 2d sess., p. 18 (1970)). This Congressional judgment is supported by the courts which have reviewed standards promulgated under the Act. In sustaining the standard for occupational exposure to vinyl chloride (29 CFR 1910.1017), the U.S. Court of Appeals for the Second Circuit stated that "it remains the duty of the Secretary to act to protect the working man, and to act even in circumstances where existing methodology or research is deficient. *Society of the Plastics Industry Inc.* v. *Occupational Safety and Health Administration*, 509 F. 2d 1301, 1308 (2nd Cir. 1975), cert. den. sub nom., *Firestone Plastics Co.* v. *United States Department of Labor*," 95 S. Ct. 1998, 4 L. Ed. 2d 482 (1975).

A similar rationale was applied by the U.S. Court of Appeals for the District of Columbia Circuit in reviewing the standard for occupational exposure to asbestos (29 CFR 1910.1001). The Court stated that:

> Some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently, as to them insufficient data is presently available to make a fully informed factual determination. Decisionmaking must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual judgments. *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F. 2d 467, 474 (D.C. Cir. 1974).

In setting standards, the Secretary is expressly required to consider the feasibility of the proposed standards. Senate Committee on Labor and Public Welfare (S. Rept. No. 91-1282, 91st Cong., 2d sess., p. 58 (1970.) Nevertheless, considerations of technological feasibility are not limited to de-

vices already developed and in use. As discussed more fully in the section on feasibility, standards may require improvements in existing technologies or require the development of new technology. *Society of the Plastics Industry, Inc. v. Occupational Safety and Health Administration*, supra at 1309; *American Iron & Steel Institute v. OSHA*, 577 F. 2d 825 (3rd Cir. 1978).

Where appropriate, the standards are to include provisions for labels or other forms of warning to apprise employees of hazards, suitable protective equipment, control procedures, monitoring and measuring of employee exposure, employee access to the results of monitoring, and appropriate medical examinations. Standards may also prescribe recordkeeping requirements where necessary or appropriate for enforcement of the Act or for developing information regarding occupational accidents and illnesses (section 8(c)). The permanent standard for lead was developed on the basis of the above legal considerations.

III. Executive Summary

The following is a summary of the health effects, permissible exposure limit, medical removal protection, and feasibility sections of the final standard. A brief description of OSHA's decisions in the final standard and their rationale is set forth in this summary. A more detailed discussion of each of these sections appears as Attachments A-D.

A. Health Effects

The record demonstrates that lead has profoundly adverse effects on the health of workers in the lead industry. Inhalation, the most important source of lead intake, and ingestion result in damage to the nervous, urinary, and reproductive systems and inhibit synthesis of the molecule heme, which is responsible for oxygen transport in living systems. The adverse health effects associated with exposure to lead range from acute, relatively mild, perhaps reversible stages such as inhibition of enzyme activity, reduction in motor nerve conduction velocity, behavioral changes, and mild central nervous system (CNS) symptoms, to permanent damage to the body, chronic disease, and death.

The signs and symptoms of severe lead intoxication which occur at blood lead levels of 80 μg/100g and above are well documented. The symptoms of severe lead intoxication are known from studies carried out many years ago and include loss of appetite, metallic taste in the mouth, constipation, nausea, pallor, excessive tiredness, weakness, insomnia, headache, nervous irritability, muscle and joint pains, fine tremors, numbness, dizziness, hyperactivity, and colic. In lead colic, there may be severe abdominal pain, such that abdominal surgery mistakenly has occasionally been performed.

Damage to the central nervous system in general and the brain (encephalopathy) in particular is the most severe clinical form of lead intoxication. The most severe, often fatal, form of encephalopathy may be preceded by vomiting, apathy progressing to drowsiness and stupor, poor memory, restlessness, irritability, tremor, and convulsions. It may arise precipitously with the onset of intractable seizures, followed by coma, cardiorespiratory arrest and death. There is a tendency toward the occurrence of weakness of extensor muscle groups, that is motor impairment. This weakness may progress to palsy, often observed as a characteristic "wrist drop" or "foot drop" and is a manifestation of a disease to the peripheral nervous system (peripheral neuropathy). Lead intoxication also results in kidney damage with few, if any, symptoms appearing until extensive and most likely permanent kidney damage has occurred. NIOSH testified that:

> Of considerable concern are the effects resulting from long-term lead exposure. There is evidence that prolonged exposure can increase the risk of nephritis, mental deficiency, premature aging, and high blood pressure (Ex. 84, p. 6).

Exposure to lead results in decreased libido, impotence and sterility in men and decreased fertility, abnormal menstrual and ovarian cycles in women. The course of pregnancy is adversely affected by exposure to lead. There is conclusive evidence of miscarriage and stillbirth in women who were exposed to lead or whose husbands were exposed. Children born of parents either of whom were exposed to lead are more likely to have birth defects, mental retardation, behavioral disorders or die during the first year of childhood.

During the past 10 years there have been many new observations and research on the health effects of lead at levels heretofore thought to be inconsequential. This research has been stimulated by the availability of many new methods for detecting and measuring the degree of impairment caused by lead exposure. These techniques measure a variety of biochemical, physiological and psychological disturbances. The methods are highly sensitive and reveal earlier changes indicative of adverse effects in workers exposed to lead.

The main research topics which have been addressed are early biochemical changes in the synthesis of the respiratory pigment heme; and early effects on the nervous system including behavioral and peripheral nerve effects. Included are studies on the involvement of lead in kidney disease, on effects on reproductive capacity of male and female workers, and on the relation between exposure to lead in air and resulting blood lead concentration.

Although the toxicity of lead has been known for 2,000 years the complex relationship between lead exposure and human response is still imperfectly understood. OSHA believes that while incapacitating illness and death represent one extreme of a spectrum of responses, other biological effects such as metabolic or physiological changes are precursors or sentinels of disease which should be prevented. This disease process can be subdivided according to Bridbord (Tr. 1976-02) into five stages: normal, physiological change of uncertain significance, pathophysiological change, overt symptoms (morbidity), and mortality. Within this process there is no sharp distinction, but rather there is a continuum of effects. Boundaries between categories overlap due to the variation of individual susceptibilities and exposures in the working population. OSHA believes that the standard adopted must prevent pathophysiologic changes from exposure to lead. Pathophysiologic changes indicate the occurrence of important health effects. Rather than revealing the beginnings of illness the standard must be selected to prevent an earlier point of measurable change in the state of health which is the first significant indicator of possibly more severe ill health in the future. The basis for this decision is twofold—first, pathophysiologic changes are early stages in the disease process which would grow worse with continued exposure and which may include early effects which even at early stages are irreversible, and therefore represent material impairment themselves. Secondly, prevention of pathophysiologic changes will prevent the onset of the more serious, irreversible and debilitating manifestations of disease.

The evidence in this record demonstrates that prevention of adverse health effects from exposure to lead throughout a working lifetime requires that blood (PbB) lead levels be maintained at or below 40 μg/100 g. OSHA concludes that workers exposed to lead leading to blood lead levels in excess of 40 μg/100 g will develop physiological and pathophysiological changes which will grow progressively worse and increase the risk of more severe disease. OSHA believes the standard must prevent these changes from occurring since this would provide greater assurances of health protection. Feasibility constraints prevent OSHA from establishing a standard which would eliminate all physiological changes, reproductive effects or

mild signs and symptoms but the agency believes the vast majority of workers will be protected by this standard. These considerations formed the basis upon which OSHA evaluated the health effects evidence in the record. The remainder of this summary will address the health effects evidence in each system: heme synthesis inhibition, and damage to the nervous, urinary, and reproductive systems. In addition, the air lead to blood lead relationship will be addressed.

1. *Heme Synthesis Inhibition.* Heme is a complex molecule which has two functions in the body. First, heme is a constituent of hemoglobin, a protein present in red blood cells whose primary function is to transport oxygen to the tissues. Interference with the formation of heme, if sufficient, results in decreased hemoglobin and ultimately anemia. Anemia is characterized by weakness, pallor and fatigability as a result of decreased oxygen carrying capacity in the blood.

Heme is also a constituent of another group of extremely important proteins, the cytochromes, which are present in every cell of the body. The function of heme in the cytochromes is to allow the cell to utilize oxygen. Heme may therefore be described as the "respiratory pigment" for the entire body. Interference with heme formation leads to interference in the respiration of every cell in the body. This is the most important effect of heme synthesis impairment. Piomelli has suggested that heme impairment in the cells would lead to a condition in each cell similar to that which would occur if the lungs of an individual did not function well. The central nervous system is particularly sensitive to the lack of oxygen and neurological damage could conceivably occur prior to anemia as a result of heme synthesis impairment in the brain. For example, Piomelli testified that "It is very well known that the human being cannot stop breathing for more than 2 or 3 minutes without developing irreversible brain damage." (Tr 460) This effect would be expected to occur from impaired respiration resulting from impaired heme synthesis. In other words, heme synthesis impairment could potentially affect every cell through reduced respiration.

The effects of lead exposure on heme synthesis have been studied extensively by the scientific community. Nevertheless, there is considerable debate over certain issues concerning the health effects of lead on this system. The Agency found three major issues particularly important in evaluating the health effects of lead in reference to heme synthesis.

(1) What is the meaning of the enzyme inhibition and physiological changes known to occur in this system at low lead levels, and should these effects be considered as per se impairment of health in the establishment of a permissible level of worker exposure to lead. (2) At what blood lead (PbB) level does a lowering of hemoglobin leading to anemia begin to occur? (3) To what extent are lead effects on heme synthesis in the blood forming system indicative of changes in heme synthesis in other tissues?

The earliest demonstrated effect of lead involves its ability to inhibit the formation of heme. Scientific evidence has established that lead inhibits at least two enzymes of the heme synthesis pathway at very low PbB levels. Inhibition of delta aminolevulinic acid dehydrogenase (ALAD), an enzyme responsible for the synthesis of a precursor to heme, is observed at PbB levels below 20 μg/100 g. At a PbB level of 40 μg/100 g more than 20 percent of the population would have 70 percent inhibition of ALA-D. In the human body when an enzyme system is inhibited two effects are often seen: First, the molecule upon which the enzyme would act accumulates because it cannot undergo chemical reaction to produce the desired product and second, the desired product therefore decreases. Significant urinary excretion of the products of ALAD inhibition, such as delta aminolevulinic acid (ALA), occurs at this PbB level; 11 percent of adult males are excreting more than 10 μg/l.

The build-up of another product of impairment indicating inhibition of another enzyme, ferrochelatase, also occurs at low PbB levels. At a PbB level of 50 μg/100 g a larger proportion of the population would suffer these effects and the effects would be more extreme. At a PbB level of 50 μg/100 g, 70 percent of the population would have 70 percent inhibition of ALA-D, 37 percent would have urinary ALA (ALA-U) values larger than 10 μg/l and 80 percent of men and 100 percent of women would have increased free erythrocyte protoporphyrin (FEP), which is the product of inhibition of ferrochelatase. (Ex. 294 E.) Industry representatives argued that these effects are the manifestation of the body attempting to maintain a stable internal environment to lead. OSHA believes that it is inappropriate and simplistic to describe these changes as biochemical adjustments. The depression of heme synthesis in all cells of the body is an effect of potentially far reaching proportion and prevention of enzyme effects is the key to the prevention of more serious clinical effects of lead toxicity, which become more obvious as the exposure continues. These measurable effects are a direct result of lead exposure and are considered by the agency to indicate the occurrence of disruptions of a fundamental and vital subcellular process, heme synthesis. These processes are not only essential to the process of hemoglobin synthesis, they are also vital to the function of all cells since heme is ubiquitous in the human.

OSHA believes the evidence indicates a progression of health effects of lead exposure starting with inhibition of enzymes, continuing through effects indicating measurable disruption of subcellular processes, such as the buildup of the products of impaired heme synthesis and eventually developing into the overt symptoms of lead poisoning as manifested by disorders in the nervous, renal, and blood forming system. Biological variability among individuals will alter the PbB level at which a particular person will move through each stage in this disease continuum. Therefore, at each higher PbB level a greater proportion of the population will manifest each given effect. Given this understanding of the progressive stages of lead effects, OSHA has concluded that enzyme effects indicative of the disruption of heme synthesis are early stages of a disease process which eventually results in the clinical symptoms of lead poisoning. OSHA agrees with Piomelli who concluded, "It is the responsibility of preventive medicine to detect those alterations (in heme synthesis) which may precede frank symptomatology and to prevent the occurrence of these symptoms" (Tr. 456).

OSHA believes that good health is not limited to the narrow definition of "absence of clinical symptoms." The early steps of the progression to disease cannot be considered as an attempt by the body to merely adjust and stabilize the internal environment to exposure to lead: They are early indications of significant physiological disruption. Whether or not the effects have proceeded to the later stages of clinical disease, disruption of these processes over a working lifetime must be considered as material impairment of health. As was previously discussed, at a PbB level of 40 μg/100 g and above, a significant proportion of the population would manifest extensive inhibition of ALA-D, elevations of ALA-U and of protoporphyrin levels. The agency believes that PbB levels should ideally be kept below 40 μg/100 g to minimize these effects.

Anemia is one of the established symptoms of lead poisoning. The symptoms of anemia are weakness, tiredness, pallor, waxy, sallow complexion, headache, irritability, and other symptoms characteristic of the increased load on the cardiac system. The clinical symptoms of anemia due to lead are often indistinguishable from those of chronic anemias with a

variety of other causes. Anemia due to lead is often seen in association with acute abdominal colic. The occurrence of anemia, as a result of lead exposure, is known to occur above PbB levels of 80 μg/100 g. The occurrence of this symptom at PbB levels below 80 was debated during the hearings.

OSHA believes that the debate concerning the occurrence of this symptom can better be comprehended within the context of an understanding of the full disease process which eventually results in anemia. The evidence concerning the mechanisms of this disease process indicates that the effect of lead on the hematopoietic system is subtle and complex. In evaluating the disease mechanisms of anemia, it was found that lead is an insidious poison which attacks, not one, but many of the physiolgical processes within the cell.

Because anemia is the result of a complex of different lead effects, there is considerable room for individual variability in the PbB level at which anemia will occur. Hemoglobin level is a continuous variable which may cause individuals to have a problem to a greater or lesser degree at any particular blood lead level. Anemia should be viewed as a late step in a complicated progression of lead effects.

Since anemia is a consequence of lowered hemoglobin (the protein in red cells responsible for respiration) OSHA has carefully analyzed those studies which reported reduced hemoglobin. Studies have associated PbB levels as low as 50 μg/100 g with lowered hemoglobin (Hb) levels (Ex.6(37); 146-A; 5(9)). In particular, Tola's study, which showed a lowering of Hb over time during lead exposure of 50 μg/100 g, is considered by OSHA as an example of lead affecting Hb levels at this low PbB range. In addition studies by the Mt. Sinai group (Ex. 24(14)), and Wolfe (Ex. 146(A)) also demonstrated lowered anemia in lead exposed workers.

Based on evidence that indicates decreases in Hb levels with blood leads above 50 μg/100 g, OSHA has concluded that a lowering of Hb level to a measurable degree will occur at PbB levels as low as 50 μg/100 g. The degree to which Hb is lowered at this PbB range may be undetected since symptoms may be mild and are not likely to be so large as to require treatment for anemia. However, these changes must not be evaluated only as short-term effects alone but rather as changes that would occur over prolonged times. This implies that with reduced hemoglobin in an asymptomatic or mildly symtomatic individual there is a lifetime alteration in the oxygen carrying capacity of the blood, in the blood viscosity and in particular, in the cardiac work load. These alterations are distinct from the frank symptoms of anemia but are far more insidious and may be deleterious to the worker over the long term. Lastly, the data does support the view that lead induced anemia is clinically apparent at PbB's as low as 50 μg/100 ml.

> In evaluating the effects of lead on heme synthesis, Piomelli suggested that hematopoietic effects such as anemia are not the most significant clinical effect of heme synthesis disruption " " ". A much more important fact is that the alteration of the mechanism of heme synthesis reflects the general toxicity of lead in the entire body. (Tr. 458)

Evidence indicates that there is disruption of heme synthesis in other tissues of the body besides blood, and that this disruption results in alteration of the oxygen transport into the cells of the body. Enzyme (ALA-D) inhibition due to lead exposure has been found in the liver at PbB levels below 40 μg/100 g (Ex. 5(22)). Electron microscope studies have revealed mitochondrial changes associated with lead exposure such as lead granules in rat liver mitochondria (TR. 459, ref. Walton in Nature 243, 1973) and broken distorted mitochondria in the renal cells of a lead-exposed worker. The mitochondria is that portion of the cell responsible for extracting nutrients and oxygen and in turn providing the energy needed elsewhere in the cell for performing cellular functions. (Cramer et al. Brit. J. Ind. Med. 1974.) Some of these studies related changes in heme synthesis in the blood forming tissues to changes in other tissues. Secchi (Ex. 5(22)) found a direct correlation of levels of ALA-D inhibition in the blood and in the liver. Millar found parallel decreases in ALA-D activity in the blood and in the brain at PbB levels above 30. (Ex. 23(65)), ref. Millar. This evidence supports Piomelli's suggestions that changes in heme synthesis in the blood forming (hematopoietic) system reflect changes that occur in other tissues. The work of Fishbein et al. related levels of products of enzyme inhibition, a measure of heme synthesis disruption in the hematopoietic system, to various signs and symptoms of lead exposure including central nervous system symptoms, muscle and joint pain, weight loss, and lead colic at blood lead levels well below 80 μg/100 ml (mean PbB was approximately 60 μg/100 ml). (Ex. 105D). Fishbein also noted anemia in 37 percent of these same workers, 17 percent of whom had blood lead levels below 60 μg/100 ml.

While the evidence relating lead effects of heme synthesis to symtoms throughout the body is not complete, the evidence is extensive enough and the issue is important enough to warrant very serious consideration with reference to the establishment of the standard. OSHA believes this evidence demonstrates that one early stage of lead disease in various tissues is the disruption of heme synthesis and that these effects in other lead-sensitive tissues parallel the measurable effects of heme synthesis disruption in the hematopoietic system and occur at comparably low PbB levels (below 40 μg/100 g). The heme effect is clearly not the only mechanism by which lead exerts it toxicological effect but it is one mechanism which we have substantial understanding of, can measure, and therefore must utilize in an effort to prevent the more severe symptoms in the individual.

In reference to the hematopoietic system, OSHA believes that the effects of lead are a complex progression from various biochemical changes through to the onset of clinical symptoms. At increasingly higher PbB levels an increasing proportion of the population will suffer more extreme effects. At a PbB level of 40 μg/100 g or above, a sizable proportion of the population would show measurable effects of the disruption of heme synthesis. A comparable degree of disruption of heme synthesis would most likely occur in other cells in the body.

Piomelli gave an excellent summary of the importance of lead's effects on heme synthesis stating:

> It is my understanding that regulations have the purpose of preventing "material impairment of health." Alterations in heme synthesis do not produce subjective evidence of impairment of health, unless they reach the extreme depression in severe lead intoxication, when marked anemia occurs and the individual feels weak. However, it is not any longer possible to restrict the concept of health to the individuals subjective lack of feeling adverse effects. This is because we know that individuals may get adjusted to suboptimal health, if changes occur slowly enough and also because we now have the ability to detect functional impairments by appropriate tests, much before the individual can perceive any adverse effect. In fact, it is the responsibility of preventive medicine to detect those alterations which may precede frank symptomatology, and to prevent its occurrence. The alterations in heme synthesis caused by lead fulfill, in my opinion, the criteria for material adverse effects on health and can be used to forecast further damage. The depression of heme synthesis in all cells of the body is an effect of far reaching proportion and it is the key to the multiple clinical effects of lead toxicity, which become obvious as the exposure continues. (Ex. 57, p. 21).

This does not in any way suggest that the lead effect on heme is the only mechanism of lead disease, but it does suggest that this effect is at least one of the important mechanisms in lead disease. An understanding of this spectrum of effects from subcellular to clinical symptoms is relevant not only to the occurrence of anemia but will

also be the expected pattern in lead-induced neurological and renal disease.

OSHA believes that there is evidence demonstrating the impairment of heme synthesis and mitochondrial disruption in tissues throughout the body, and that these effects are the early stages of lead disease in these various tissues. The disruption of heme synthesis measured at low PbB levels is not only a measure of an early hematopoietic effect, it is also a measure which indicates early disease in other tissues. The Agency believes that such a pervasive physiological disruption must be considered as a material impairment of health and must be prevented. PbB levels greater than 40 μg/100 g should, therefore, be prevented to the extent feasible.

2. *Neurological effects.* There is extensive evidence accumulated in both adults and children which indicates that toxic effects of lead have both central and peripheral nervous system manifestations. The effects of lead on the nervous system range from acute intoxication, coma, cardiorespiratory arrest and fatal brain damage to mild symptoms, subtle behavioral and electrophysiologic changes associated with lower level exposures. Although the severe effects of lead have been known for some time, only in the last several years has evidence accumulated which demonstrates neurologic damage at low blood lead levels. All of this data reinforces a disturbing clinical impression that nervous system damage from increased lead absorption occurs early in a worker's tenure, at low blood lead levels and is only partially reversible if at all. It is now understood that the location and degree of neurological damage depends on dose and duration of exposure.

The record in this rulemaking demonstrated that damage occurs in both the central and peripheral nervous systems at blood lead levels lower than previously recognized. In particular, Lilis et al. (Ex. 24, (10)) has demonstrated central nervous system symptoms (tiredness, fatigue, nervousness, sleepnessness or somnolency, or anxiety) in 56 percent of workers with blood lead levels below 80 μg/100 ml. The mean blood level was approximately 60 μg/100 ml. This same study reported symptoms of muscle and joint pain and/or soreness in 39 percent of the workers. It is extremely important to note that many of these subjects had been exposed less than a year. They also were able to demonstrate behavioral changes which were correlated with enzyme inhibition products from heme synthesis. Given this data, the authors cautioned that blood lead levels should not be allowed to exceed 60 μg/100 ml. and should be maintained around 40 μg/100 ml. Lilis testified that about 60μg/100 ml. "one may expect florid lead poisoning, full blown lead poisoning" (Tr. 2700). She proceeded to state:

"Since ZPP starts to go up at around levels of 40 or 45, that means that at those levels you already find something going wrong in the body" (Tr. 2702). Repko has carried out behavioral tests and demonstrated adverse effects in visual reaction time, as well as deficits in hearing among workers having a mean blood lead level of 46 μg/100 ml. Valciukas et al. and Haenninen et al. have also demonstrated impaired psychological performance among workers with low exposure to lead. Haenninen's work is particularly significant insofar as no single blood lead concentration had ever exceeded 70 μg/100 ml.

Based on the rulemaking record, OSHA has concluded that the earliest stages of lead-induced central nervous system disease first manifest themselves in the form of behavioral disorders and CNS symptoms. These disorders have been documented in numerous sound scientific studies and these behavioral disorders have been confirmed in workers whose blood lead levels are below 80 μg/100 g. Given the severity and potential non-reversibility of central nervous system disease, OSHA must pursue a conservative course of action. OSHA concludes that a blood lead level of 40 μg/100 g must be considered to be a threshold level for behavioral changes and mild CNS symptoms in adults, and to protect against long-term neurological effects, blood levels should never exceed 60 μg/100g.

Some of the most extensive evidence in the rulemaking record is the data presented which confirms the existence of the early stages of lead induced damage to the peripheral nervous system in workers exposed to lead levels below 70 μg/100 g. Damage to the peripheral nervous system is named peripheral neuropathy and the distinguishing feature of it is the predominance of motor involvement as opposed to sensory damage. Three forms are noted. In the first, patients with acute abdominal colic may also complain of very severe pain and tenderness in the trunk muscles, as well as pain in the muscles of the extremity. As the pain and tenderness subside, weakness may emerge, with very slow recovery over the ensuing several months. In the second, more common form of peripheral neuropathy due to lead poisoning, the neuropathy is described as painless, peripheral weakness occurring either after termination of excessive exposure or after long, moderately increased exposure. This suggests that neuropathy of sufficient severity may cause irreversible impairment of peripheral nerve function.

The third form is seen in subjects with no obvious clinical signs of lead poisoning and is manifested by a slowing of motor nerve conduction velocity. The latter effect represents the earliest sign of neurological disease of the peripheral nerves. OSHA believes prevention of this stage is necessary to prevent further development of the disease and its associated forms which are likely to be irreversible.

The work of Catton, Oh, Landigran, Feldman, Behse Mostafa et al., Geraid et al., Guadriglic et al., Araki, W. R. Lee, Repko, Lilis, Fischbein et al., and Seppalainen all demonstrate statistically significant loss of motor nerve conduction velocity in lead-exposed workers. Seppalainen was able to determine a dose-response relationship for the slowing of NCV compared with blood lead levels. It is apparent that slowing occurs in workers whose PbB levels are 50 μg/100 g and above but, whether there are effects as low as 40 μg/100 g is, as yet, undetermined. The 38 lead experts who participated in the Second International Workshop on Permissible Exposure Levels for Occupational Exposure to Inorganic Lead also reached this conclusion in their final report:

> It is not known whether the maximum blood lead concentration or the integrated average concentration is the determining factor in the development of changes in nerve conduction velocity. However, the Group concluded from the data presented by Seppalainen et al. and the data reported in the literature that changes in nerve conduction velocity occur in some lead workers at blood levels exceeding 50 μg/100ml. It was thought that no conclusion could be drawn from the one case in the blood lead range 40-49 μg/100ml.
>
> It is not possible to decide what any given measured small deficit means in terms of specific nervous damage. However, it is generally recognized that a clear deficit in the nerve conduction velocity of more than one nerve is an early stage in the development of clinically manifest neuropathy. There is no evidence that these changes progress. Reversibility should be studied. Although slight changes may be measured in persons experiencing no symptoms, it was the consensus of the group that such changes should be regarded as a critical effect. (Ex. 262, p.64.) (Critical effect is a defined point in the relationship between dose and effect in the individual, namely the point at which an adverse effect occurs in cellular function of the critical organ.)

These conclusions by recognized experts in the field were based largely on the work of Seppalainen and her coworkers. This work has been described by an industry spokesman, Dr. Malcolm, as being "immaculate." (Tr. 2073) Based on the extensive evidence in the record from Seppalainen and others, OSHA has concluded that exposure to lead at low levels causes peripheral neuropathy at exposure levels previously thought to be of relatively

little consequence. Seppalainen has stated:

Of course, in terms of health, the importance of slight subclinical neuropathy can be questioned, too, and we did not find any evidence that the well being of these workers was influenced by the neuropathy, apart from a few complaints of numbness of the arms. Thus, the term "poisoning," in its orthodox sense, cannot be applied to these disorders. But neuropathy, no matter how slight, must be regarded as a more serious effect than the quite reversible alterations in heme synthesis, because the nervous system has a poor regenerative capacity, and the acceptability of such a response must be judged from that point of view. Since the entire question belongs to the diffuse "gray area" between health and disease, it is more than probable that opinions will diverge. We think, however, that no damage to the nervous system should be accepted, and that, therefore, present concepts of safe and unsafe PbB levels must be reconsidered (Ex. 5(12), p. 183).

Recovery from the effects of chronic lead poisoning may be feasible in some cases, if the worker is removed from the source of exposure and therapy is initiated immediately. There are instances, however, when complete recovery is impossible and the pathology is fixed. Even if the worker is removed from the source and therapy initiated, the worker may still experience impairment. In a recent paper describing his results Dr. R. Baloh, a neurologist at UCLA, questioned the reversibility of nervous system damage:

Although there are isolated reports of significant improvement in lead-induced motor neuron disease and peripheral neuropathy after treatment with chelation therapy, most studies have not been encouraging, and in the case of motor neuron disease, death has occurred despite adequate chelation therapy.

All of this data reinforces a disturbing clinical impression that nervous system damage from increased lead absorption is only partially reversible, if at all, with chelation therapy and/or removal from further exposure. This is not particularly surprising, however, since experience with other heavy metal intoxication has been similar. Nervous system damage from arsenic and mercury responds minimally to chelation therapy. Apparently, irreversible changes occur once the heavy metal is bound by nervous tissue. Although further study is clearly needed, the major point I would like to make this morning is that there is strong evidence to suggest the only reliable way to treat nervous system damage from increased lead absorption is to prevent its occurrence in the first place (Ex. 27(7), p. 55).

OSHA agrees with these concerns regarding irreversibility of neurological disease expressed by Dr. Baloh and therefore must establish a standard which will prevent the development of nervous system pathology at its earliest stages.

In order to prevent peripheral neuropathy as evidenced by slowing in NCV's Seppalainen testified that "to be safe, I would say 50 μg/100 g blood" is the necessary level (Tr. 147). Dr. Seppalainen further recommended that studies be performed to determine "the safety at the level of 50 μg/100 ml" (Tr. 153). OSHA agrees that the current evidence demonstrates that nerve conduction velocity reduction occurs at PbB levels of 50 μg/100 g and above. Therefore, a necessary goal of a standard for occupational lead exposure must be to assure that blood lead levels are maintained below 50μg/100 g in order to provide an adequate margin of safety.

3. *Renal system.* One of the most important contributions to the understanding of adverse health effects associated with exposure to inorganic lead was the elucidation of evidence on kidney disease during the hearings. It is apparent that kidney disease from exposure to lead is far more prevalent than previously believed. In the past, the number of lead workers with kidney disease in the United States was thought to be negligible, but the record indicates that a substantial number of workers may be afflicted with this disease. Wedeen, a nephrologist (kidney specialist), who testified at the hearings for OSHA stated that a minimal estimate of the incidence of this disease (nephropathy) would be 10 percent of lead workers. "According to this estimate, there may be 100,000 cases of preventable renal disease in this country. • • • If only 10 percent of these hundred thousand workers with occupational nephropathy came to chronic hemodialysis (kidney machines) the cost to medicare alone would be about 200 million dollars per year." (Tr. 1741-42.)

The hazard here is compounded by the fact that, unlike the hematopoietic system, routine screening is ineffective in early diagnosis. Renal disease may be detected through routine screening only after about two-thirds of kidney function is lost or when manifestation of symptoms of renal failure are present. By the time lead nephropathy can be detected by usual clinical procedures, irreparable damage has most likely been sustained. When symptoms of renal failure are present, it is simply too late to correct or prevent the disease and "progression to death or dialysis is likely." (Tr. 1732.) The research of Wedeen and his co-workers, the health hazard evaluation by NIOSH at Eagle Picher Industries, Inc., and the research in secondary smelters by Lilis, Fishbein, et al. demonstrated that lead exposure is a key etiologic agent in the development of kidney disease among occupationally exposed workers. Clearly, too little attention has been given to lead-induced renal disease in recent years, and while OSHA recognizes that further research is required to understand fully the disease mechanism, it is also necessary to protect the thousands of workers who are potentially in danger of developing renal disease. The record indicates that blood lead is an inadequate indicator or renal disease development. Dr. Bridbord questioned Dr. Wedeen on the issue of chronicity of exposure and blood lead levels:

Dr. Bridbord: Well, looking at a group of workers, currently employed, having a blood lead level on that worker and having some information, that to the best of our knowledge there were no major changes in that particular plant during the past number of years. Would that not be a somewhat better index of what the blood lead levels might have been in the past. Considering too, that these workers are currently employed.

Dr. Wedeen: Sure I think that the blood level measured close to the time of exposure is probably more reflective. I worry very much, that this may occur after a few months of exposure and the blood lead level may remain the same for the next 20 years, despite the fact that the individual is continually accumulating lead in the body.

Dr. Bridbord: Would you think that the chronicity of lead exposure, apart from precisely whether the blood lead was above or below 80 or above or below 60 for example, might be an important factor in determining the eventual development of renal disease in lead workers?

Dr. Wedeen: Yes; that is just what I meant, that the accumulative effects and the cumulative body burden may be very different from the blood lead level at any moment in time.

In other words, one could certainly imagine that a blood lead level of 80, for two years, may be very similar to a blood lead level of 40, for four years. I don't have that data, but something like that may well exist in terms of the danger of the different levels of exposure.

Dr. Bridbord: Alright.

Particularly, in view of that, and given the requirements of the Occupational Safety and Health Act, that sets standards which protect during the working lifetime. Would you have some reservations about a blood lead maximum standard, even at 60?

Dr. Wedeen: I certainly would. And I think I just expressed the basis for it. You will note that in my recording of these patients, very very few of them had blood lead levels over 60. I just feel that while the blood lead level is maybe better than nothing, it may be very practical. It probably doesn't do the job we are trying to do and certainly not from the physician's point of view, who has seen the individual patient, who may or may not be a current exposure at the level that got his disease (Tr. 1765-1766).

The lead standard must therefore be directed towards limiting exposure so that occupational lead nephropathy is prevented. The Agency agrees with the views of Wedeen:

I have reported today 19 lead workers who have lost 30 to 50 percent of their kidney function. Since they showed no symptoms and had no routine laboratory evidence of kidney disease, it may be asked why this kidney function loss should be viewed as material damage. Lead nephropathy is im-

portant because the worker has lost the functional reserve, the safety, provided by two normal kidneys. If one kidney becomes damaged, the normal person has another to rely upon. The lead worker with 50 percent loss of kidney function has no such security. Future loss of kidney function will normally occur with increasing age, and may be accelerated by hypertension or infection. The usual life processes will bring the lead worker to the point of uremia, while the normal individual still has considerable renal functional reserve. Loss of a kidney is therefore more serious than loss of an arm, for example. Loss of an arm leads to obvious limitations in activity. Loss or a kidney or an equivalent loss of kidney function means the lead worker's ability to survive the biologic events of life is severely reduced. By the time lead nephropathy can be detected by usual clinical procedures, enormous and irreparable damage has been sustained. The lead standard must be directed towards limiting exposure so that occupational lead nephropathy does not occur (Tr. 1747-1750).

And OSHA agrees with Dr. Richard Wedeen, that "40 μg/100 ml is the upper acceptable limit" (TR. 1771). That is, while PbB levels are an inadequate measure of occupational exposure (though most agree the best available single measurement) they nonetheless provide a basis for determining body burden when measured over an extended period of time. OSHA believes that maintenance of PbB levels at or below 40 μg/100 ml will reduce the overall dose to the worker, decrease the body burden of lead and prevent sufficient buildup of lead in the kidney to effect renal damage.

4. *Reproductive effects.* Exposure to lead has profoundly adverse effects on the course of reproduction in both males and females. In male workers exposed to lead there is evidence of decreased sexual drive, impotence, decreased ability to produce healthy sperm, and sterility. During the hearings there was considerable discussion of the evidence submitted by Lancranjan et al. which demonstrated that the reproductive ability of men occupationally exposed to lead is interfered with by altered sperm formation. Lancranjan et al. reported a significant increase in malformed sperm (teratospermia) among lead-poisoned workmen (blood lead mean 74.5 μg/100 ml) and workmen with moderately increased absorption (blood lead mean 52.8 μg/100 ml). Decreased number of sperm (hypospermia) and decreased motility (athenospermia) were observed not only in the preceding roups but also in those with only slightly increased absorption (blood lead mean 41 μg/100 ml). The authors concluded that these alterations were produced by a direct toxic effect on the male gonads, and that a dose response relationship exists with respect to teratospermia. The other parameters measured, hypospermia and athenospermia, do not show as strong a relationship but are significantly altered over controls. This work is consistent with other earlier literature quoted by Lancranjan.

"Epidemiologic studies have pointed out previously both the reduction of number of offsprings in families of workers occupationally exposed to lead and increase of the miscarriage rate in women whose husbands were exposed to lead. Experimental investigations have also shown both a reduction in the number of offspring of laboratory animals and reduced birthweight and survival of progenies of animals fed with diets containing lead." (Ex. 23 (Lancranjan et al.), p. 400.)

In their paper entitled "Review paper: Susceptibility of adult females to lead; effects on reproductive function in females and males" Zielhuis and Wibowo criticized the study by Lancranjan et al., and there was considerable critical discussion of it during the hearings. OSHA has concluded that methodological problems in the study do not negate the overall validity of the study especially when viewed in the context of other research in the literature. The Lancranjan study is strongly indicative of adverse effects on male reproductive ability at low lead levels, and there is evidence indicating a dose-response relationship with respect to teratospermia in these lead exposed workers. In OSHA's view altered spermatogenesis represents impaired reproductive capacity of the male given that sterility is the likely outcome. OSHA believes that this evidence and other studies support the conclusion that lead exerts markedly adverse effects on the reproductive ability of males.

Germ cells can be affected by lead which may cause genetic damage in the egg or sperm cells before conception and which can be passed on to the developing fetus. The record indicates that genetic damage from lead occurs prior to conception in either father or mother. The result of genetic damage could be failure to implant, miscarriage, stillbirth, or birth defects.

The record indicates that exposure of women to lead is associated with abnormal ovarian cycles, premature birth, menstrual disorders, sterility, spontaneous miscarriage, and stillbirths. Infants of mothers with lead poisoning have suffered from lowered birth weights, slower growth, and nervous system disorders, and death was more likely in the first year of life.

There is conclusive evidence in the record that lead passes through the placental barrier. Multiple studies have established that the fetus is exposed to lead because of the passage of lead through the placental membrane. This evidence was uncontroverted during the hearings. The lead levels in the mother's blood are comparable to concentrations of lead in the umbilical cord blood at birth. Transplacental passage becomes detectable at 12-14 weeks of gestation and increases from that point until birth.

Numerous parties at the hearings raised the issue of whether the fetus is the most sensitive organism requiring protection from exposure to lead. Bridbord, for example, argued that the immaturity of the blood brain barrier in the newborn raises additional concern about the presence of lead in fetal tissues.

There is little direct data on damage to the fetus from exposure to lead but there are extensive studies which demonstrate neurobehavioral effects at blood leads of about 30 μg/100 ml and above in children. OSHA believes that the fetus and newborn would be at least as susceptible to neurological damage as would older children and therefore data on children is relevant to the fetus, although acknowledging the duration of exposure may be more limited in the fetus. OSHA asserts that damage to the fetus represents impairment of the reproductive capacity of the parent and must be considered material impairment of functional capacity under the OSH Act.

The proposed lead standard raised the possibility that "the risk of the fetus from intrauterine exposure to high levels of lead in the mother's blood is maximal in the first trimester of pregnancy when the condition of pregnancy may not be known with certainty" (Ex. 2, p. 45936; Ex. 95). OSHA agrees with Dr. Vilma Hunt who testified that "the first trimester has not been shown to be the period of highest vulnerability for the fetus." (Ex. 59). OSHA has concluded that the fetus is at risk from exposure to lead throughout the gestation period, and therefore protection must be afforded throughout pregnancy.

Exposure to lead would be expected to adversely affect heme biosynthesis and the nervous system earliest and most profoundly in the fetus. Early enzyme inhibition in the heme forming system has been well documented, and the central nervous system has its most significant growth during gestation and the first 2 years following birth.

Lead is capable of damaging both the central and peripheral nervous systems of children. At high exposures to lead (80 μg/100 ml and above) the central nervous system may be severely damaged resulting in coma, cardiorespiratory arrest and death. Symptoms of acute encephalopathy similar to those in adults have been reported in young children with a markedly higher incidence of severe symptoms and deaths occurring in them than in adults. In children once acute encephalopathy occurs there is a high probability of permanent, irreversible

damage to the CNS. There is data that demonstrates permanent damage to CNS has occurred in children exposed at low lead levels and in whom no overt symptoms were in evidence. Children whose blood lead levels were 50 μg/100 ml and above have demonstrated mild CNS symptoms including behavioral difficulties. Behavioral disturbances in children such as hyperact vity have been associated with blood lead levels between 25 and 55 μg/100 ml. Animal studies have confirmed these findings. Beattie demonstrated an increased probability of mental retardation in children exposed to lead via maternal ingestion of lead in water. Elevated blood lead levels were found in the retarded children compared to the control group. There appeared to be a significant relationship between blood lead concentration and mental retardation. Mean blood lead for the retarded children was 25.5 μg/100 ml. Water lead concentrations in the maternal home during pregnancy also correlated with the blood leads from the mentally retarded children.

Motor nerve conduction velocity (NCV) decrements indicating early peripheral neuropathy have been reported in children. Early studies showed NCV decrements in children whose blood lead levels were 40 μg/100 g and above.

While a critical review of the literature leads to the conclusion that blood lead levels of 50 to 60 μg/100 ml are likely sufficient to cause significant neurobehavioral impairments, there is evidence of effects such as hyperactivity as low as 25 μg/100 g. Given the available data OSHA concludes that in order to protect the fetus and newborn from the effects of lead on the nervous system, blood lead levels must be kept below 30 μg/100 g. In general, 30 μg/100 g appears to be reasonably protective insofar as it will minimize enzyme inhibition (ALAD and FEP) in the heme biosynthetic pathway and should minimize neurological damage. OSHA agrees with the Center for Disease Control (Ex. 2(31)), the National Academy of Sciences (Ex. 86M), and the EPA (FEIS (92)) that the blood lead level in children should be maintained below 30 μg/100 g with a population mean of 15 μg/100 g. Levels above 30 μg/100 g should be considered elevated.

In general OSHA believes that the evidence overwhelmingly indicates the blood lead level of workers who wish to plan pregnancies should be maintained below 30 μg/100 in order to prevent adverse effects from lead on the worker's reproductive abilities. To minimize the risk of genetic damage, menstrual disorders, interference with sexual function, lowered fertility, difficulties in conception, damage to the fetus during pregnancy, spontaneous miscarriage, stillbirth, toxic effects on the newborn, and problems with the healthy development of the newborn or developing child blood lead levels should be kept below 30 μg/100 g in both males and females exposed to lead who wish to plan pregnancies.

During the hearings there was considerable testimony on reproductive effects in relation to the PEL and equal employment opportunity considerations. No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry. More than a dozen witnesses testified on this issue; many others offered their views in response to questions; over 400 pages of the transcript of these proceedings were devoted to this issue. Ms. Hricko testified that women of childbearing age had been excluded from employment because "the response of industry has been to "protect women workers from lead's reproductive hazards by refusing to hire them or by forcing them to prove that they can no longer bear children." (Ex. 60 (aXii)). However, there was also testimony which demonstrates that women have and do work in production areas of battery manufacturing (Tr. 1245, 4057, 4506, 4855, 5529, 5898). In its proposal OSHA raised the issue of whether "certain groups of adult workers may have greater susceptibility to lead intoxication than the general worker population. One such group is female employees of childbearing age." (Ex. 2, p. 45936). The LIA argued in its post hearing brief that OSHA is not obligated to set a health standard which would insure equal employment for all persons. That is, a standard should not be promulgated which would be based on protection of the fetus and the pregnant female since that would require a lower PEL which would have correspondingly greater costs of compliance. Industry testimony further suggests that women of childbearing potential could be "protected" by excluding them from employment in many parts of the lead industry.

Other parties to the hearings argued that given the data on male reproductive abilities and potential genetic effects in males and females, fertile men were equally at risk as women of childbearing age; therefore, the standard should be designed to protect all exposed workers, male and female.

Dr. Stellman testified as follows:

> In summary, it can be stated that there is no scientific justification for placing all women of childbearing age into a category of a susceptible subgroup of the working population. There is sufficient data available to show that a significant proportion of the population is at risk from the effects of exposure to lead, and hence can also be deemed susceptible. Further, if the intent of the OSHA standard is to protect workers from reproductive effects, there is still no justification for treating women separately from men. (Tr. 1161-62)

This view was supported by other witnesses (Ex. 92; Ex. 343; Ex. 59; 60A). Dr. Hunt, for example, stated:

> There is no evidence to allow a conclusion that women of childbearing age themselves are more susceptible to the adverse effects of lead. The susceptible population is made up firstly of the fetus in utero, actually present in the work environment and secondly the offspring of male and female workers with blood lead levels high enough to alter their genetic integrity. (Ex. 59, p. 26.)

Based on the entire record, OSHA has reached the following conclusions regarding the reproductive effects of lead exposure.

A. Lead has profoundly adverse effects on the reproductive ability of male and female workers in the lead industry.

B. Lead exerts its effects prior to conception through genetic damage (germ cell alteration), effects on menstrual, and ovarian cycles and decreased fertility in women, decreased libido and decreased fertility in men through altered spermatogenesis.

C. During pregnancy, the result of lead exposure may include spontaneous abortion, stillbirth, and damage to the fetus.

D. Following birth the child of lead exposed parents may exhibit birth defects, neurological damage and the chances of death within the first year may be increased.

E. To protect against the adverse effects of lead exposure to persons planning pregnancies (or pregnant) the blood lead level should be maintained below 30 μg/100 g. Although there is no evidence for a "no effect" level, OSHA believes the risk of reproductive effects would be minimized at this level.

In conclusion, the record in this rulemaking demonstrates conclusively that workers exposed to lead suffer material impairment of health at blood lead levels far below those previously considered hazardous. Inhibition of the heme biosynthesis pathway, early stages of peripheral and central nervous system disease, reduced renal function and adverse reproductive effects are all evidence of adverse health effects from exposure to lead in workers at blood lead levels of 40 μg/100 g and above. Based on this record OSHA has concluded that blood lead levels should be maintained at or below 40 μg/100 g and even lower for workers who wish to plan pregnancies.

5. *Air to blood relationship.* The proposed lead standard reduced the permissible exposure limit from 200 μg/m³ to an 8-hour time-weighted average concentration, based on a 40-hour workweek of 100 micrograms of lead per cubic meter of air (100 μg/m³).

The Lead Industries Association (LIA) recommended that OSHA adopt a biological enforcement limit instead of using a specific airlead number for all industries and operations. One of the key questions raised by LIA in justifying a biological standard was the purported lack of a relationship between air lead levels and blood lead measurements. The purpose of this section is to address the air lead level to blood lead level relationship.

Based upon the evidence in the record OSHA has concluded that a relationship between air lead levels and population-average blood lead levels unquestionably exists and OSHA is confident that a permissible exposure limit based upon measurement of air lead levels will accomplish the intended goal of protecting worker health.

In order to accurately predict the effects on blood lead levels over time produced by changes in air lead levels, it was necessary to construct a model that takes into account the important factors which affect blood lead levels. The adaptation of the physiological model originally developed by S. R. Bernard by the Center for Policy Alternatives (CPA) combines experimentally observed properties of mammalian lead transport and metabolism, including considerations of the dynamics of blood lead response to long term exposure, with observed physical properties of airborne particulates encountered in the workplace, in order to produce a complete and accurate picture of the response of blood lead levels to particulate lead exposure. The Bernard model is an example of one of the most common types of models used to describe the transport and metabolism of drugs or foreign substances in the body, known as a multicompartment mammillary model. Such models postulate that the substance in question first appears in the blood, and then is transported or diffused into a number of different compartments from the blood, corresponding to the different organ systems in the body. Transfer is assumed to occur only between the blood and the organ compartments, not between organ compartments. The rate of transfer into and out of the blood stream from the various compartments depends upon a number of factors, such as whether or not that particular organ specifically takes up or metabolizes the substance in question. In general, especially in the case of substances which are not metabolized, the rate of transfer between compartments is linearly related to the concentration of the substances in the compartments. This is consistent with the basic physical principles of chemical kinetics that would govern the transfer of a substance across an inert membrane in the absence of any other driving force. The relatively few exceptions to the linear transfer principle tend to occur only in cases where an organ specifically sequesters or metabolizes the substance in question.

In designing a model and calculating the rate of transfer between compartments, the experimenter has many guidelines as to how to proceed. First, one can simply follow total body excretion to ascertain the number of compartments that are individually taking up and excreting lead after an initial dose. The more exponential terms required to fit the data, the more compartments. Second, the investigator can actually follow the rate of uptake and release of the substance from the various tissues by autopsy or biopsy, and measure the rate of release. This latter approach is impossible, of course, in the study of human subjects. After observing the rates of release of the substance in question from the whole body and/or tissues, the investigator is left with a series of exponential retention equations which relate amount of lead left in each compartment after a given time to the initial dose. Using rather complicated but well-developed mathematical techniques, this set of equations can be solved subject to the constraint that all of the ingested substance is accounted for, to yield the rate constants for transfer between compartments. The CPA study also included specific consideration of particle size and individual variability in response to air lead, which is necessary in predicting the response of large populations of workers to changes in air lead exposure. OSHA has determined that the Center for Policy Alternatives (CPA) application of the Bernard Model accurately predicts the effects on blood leads over time produced by changes in air lead levels.

OSHA considers that both the basic construction of the Bernard Model of physiological lead transport and the application of the Bernard Model for prediction of blood lead levels represents a unique accomplishment heretofore unseen in attempts to establish air level to blood level relationships. Insofar as this model takes into account particle size and job tenure it has avoided the serious weaknesses of earlier studies. The findings of those previous studies were incorporated into the development of the model. The final model represents a synthesis of the best available evidence in the record with CPA application of the Bernard Model of physiological lead transport.

Participants in the hearings argued that total reliance be placed upon air sampling or biological monitoring to the exclusion of the other. OSHA will require use of both measures to maximize protection of the lead worker population in general and the individual worker in particular. However, in the enforcement context OSHA will place primary reliance on air lead level measurements to determine compliance with the permissible exposure limit. Further discussion of the permissible exposure limits is found in that section.

In order to establish the correlation between air lead levels and the corresponding blood lead levels OSHA relied in its proposal on the work of Williams et al. (Ex. 5(32)) which was the most comprehensive reported study of its kind at that time. OSHA, in this final standard, has evaluated the findings of a series of subsequent studies which became available during the rulemaking process.

Almost all of the studies, whether based on observation of general or occupational populations, attempt to relate measurements of blood lead values to observed air lead values by means of linear regression techniques. Regression analysis is a technique used to study the change of the mean value of one variable (average blood lead) as the other variable (air lead) changes. There are a number of practical and theoretical difficulties in the design and execution of experiments of this type which should be considered before attempting to discuss and compare the results of the various studies in question. The limitations of the studies in the record include:

The contribution of lead from unmeasured long term air lead exposures to current blood lead level is not properly considered. When the simple regression equation:

$$\text{Current Blood-Lead} = a(\text{Current Air Lead}) + b + \text{Individual error}$$

(a = slope of the line; b = blood lead at zero air lead)

is used to model the data, the blood lead contributed by the exchange of lead in bone and tissue to blood is not taken into consideration. This has the consequence that the intercept at zero current air lead exposure ("b" in the regression equation above) is biased high and the blood lead-air lead slope ("a" in the regression equation) is biased low relative to the slope which would be found if the relationship were redefined in terms of long term average blood lead level and long term average air lead exposure. This has the practical effect of incorrectly predicting that the mean PbB level at 200 $\mu g/m^3$ will be close to that at 100 $\mu g/m^3$, which was a criticism made by LIA during the hearings. To the degree that the contribution of prior exposure to curent blood lead levels differs for different workers in the sample, the "individual error" term will also be increased.

The regression equation does not explicitly incorporate terms relating to particle size. If, as suggested by some data in the record, workers at high air lead exposure levels are exposed to a larger proportion of poorly-absorbed large particulates than workers at low air lead exposure levels, then this will cause an additional upward bias to the "b" zero occupational exposure intercept and a downward bias to the "a" blood lead-air lead slope coefficient. This creates an impression that the rate at which blood lead changes relative to the air lead would be less than it actually would be.

Measurement errors of different kinds affect the results in different ways. Any errors in measuring blood lead level will add to the "individual error" term. However, errors in measuring air lead levels (arising either from inevitable imprecision in sampling or analysis or from unrepresentativeness of the short sample period relative to true average exposure) will usually systematically bias the "a" blood lead-air lead slope downward. This is a particularly serious source of bias in one of the major studies, the Buncher analysis (Ex. 285) of the Delco-Remy data, where single air lead measurements were paired with blood level determinations made within a month of the air sampling. All other major studies of air lead-blood lead relationships used averages of several independent air lead measurements (generally ten or more measurements) for assessments of individual worker air lead exposures.

None of the studies made measurements of work-load or total worker respiration on the job. To the degree that workers differ from each other in gross ventilation, the individual error term is larger than it might have been. To the degree that populations of workers in different plants or in different industries differ in average respiration rate, potentially controllable or avoidable discrepancies in the results of different studies may have been produced.

Viewed in this context, the fact that there are differences in the blood lead-air lead regressions derived from short term observations on different populations is hardly surprising. It is also understandable that many of the studies find unreasonably high values of the intercept at zero exposure ("b"). From studies of general populations with no occupational lead exposure, it is clear that the true "b" intercept is certainly under 25 μg/100g, and is very probably under 20 μg/100g for most areas.

The following table summarizes the results of the regression analyses developed from the studies in the hearing record. This table also compares the studies to the model and demonstrates that even given the limitations of the studies the results are similar.

TABLE 1.—*Suggested air lead/blood lead relationships*

LINEAR RELATIONSHIPS

Blood Lead = a(Air Lead) + b

Source of Relationship	b	a	Non-Linear
King: Smelting (3)	52	0.053	
Battery (1)	46	.032	
Pigments (2a)	30	.07	
Pigments			(*)
(Quadratic fit)			
Globe Union	39.7	.1229	
ASARCO (El Paso)	32	.185	
Williams	30.1	.301	
Delco-Remy (Buncher)	37.45	0628	
Azar/Hammond			(*)
CPA: Bernard model and assumption C			
Job tenure (years)			
0.99	25.80	.1521	
3.4	28.30	.2062	
9.0	29.80	.3404	
16.0	30.84	.2604	
28.5	31.46	.2776	

* Blood Lead = 26 + .12 (Air lead) + .000096 (Air Lead)²

* Log(Blood Lead) = 1.3771 + .162 log 40(Air) + 128 + 184

The available studies also have some individual limitations which should be borne in mind when considering the results:

The King studies (Ex. 234(22)) included many workers exposed at very high (300-900 μg/m³) air lead exposure levels. There is reason for concern that (1) because of particle size and absorption effects, the blood lead-air slope at very high air lead levels may not accurately reflect the slope in the air lead exposure region of interest for standard-setting (25-200 μg/m³), and that (2) there is risk that selection effects may have biased the observed air lead slope low; some workers who show high blood lead levels in response to a given air lead level may be absent from the high air lead exposure groups because of medical transfer to lower or no exposure jobs.

The Globe Union study (Ex. 150A) is based on a relatively small sample, although many of the sample points are of better quality than the points of other studies because they are based on averages of many air lead and blood lead determinations over a relatively long time (6 months or more).

The ASARCO El Paso (Ex. 142 D) and Williams (Ex. 2(32)) studies each measured air lead and blood lead levels over a quite brief period (2 weeks). Additionally, the use of a control group of plastics workers at low air lead exposure levels in the Williams study has been criticized on the ground that the particulate air lead of the plastics workers' exposures may have been qualitatively (particle size, solubility) different from the exposures of the battery workers at higher air lead exposure levels.

The Azar/Hammond relationship (Ex. 54) is an extrapolation of data from non-occupational exposures far below the exposure range of occupational situations. Use of a logarithmic model for such extrapolation is without theoretical justification.

As summarizations of available data on different populations, the existing studies are reasonably valid. It is one thing to say, however, that a linear relationship was observed between the blood lead levels and air lead exposure at a given level of statistical significance, for a given sample or workers, and another thing entirely to use the observed relationship to predict the effect of lowering air lead exposure on even that same sample of workers, let alone to generalize to other samples. Generally, data obtained at a given point in time, should be used conservatively when attempting to predict effects over time. Rarely will all other factors be held constant.

Recognizing these limitations by no means should be taken to imply that the data are useless or that no reliable relationship exists between long term air lead exposures and blood lead levels. To the extent that the likely systematic errors in the short term studies are understood (e.g., overestimation of the blood lead-air lead slope coefficient and overprediction of the intercept at zero occupational exposure), the observed regressions can be used to bound estimates of the true long-term relationships of blood lead to occupational air lead exposure. To the extent that the sources of uncontrolled variation within and between studies are understood, estimates of the likely effects of such factors can be explicitly incorporated into a more comprehensive description of the general system.

Because of the deficiencies in observational studies of air lead-blood lead relationship, it is useful to supplement the empirical air lead-blood lead correlations with relationships derived from physiological models of lead transport in the body. As previously stated the weight of the evidence demonstrates that the model developed by the Center of Policy Alternatives (CPA) is an accurate tool for assessing the blood lead level response to alternative air lead exposures.

In order to predict the numbers of workers who will be above a given blood level at any one time, it is necessary to have an estimate of the spread of individual workers' blood lead levels about a population mean. Observed variability in a worker population will have three basic components:

(1) Individual differences in the long term (years) average blood level response to a given air lead level;

(2) Individual differences resulting from true short term (days or weeks) fluctuations in blood lead level; and

(3) Apparent short term variability from measurement error.

Based on an analysis of data from the Delco-Remy battery plant, it is estimated that true long term blood lead variability corresponds to a standard deviation of approximately 5.5 μg/100g. This is likely to be an underestimate of true long term differences in blood lead resulting from a constant air lead exposure because a single plant over a limited time is unlikely to include as large a diversity in the many factors producing long term variability as would prevail in a random sample of all lead-using industries. The value of 9.5 μg/100g, used in the previous CPA work as an upper bound on true long term variability, appears to be the best mid-range estimate of total (short and long term) true variability. A high range estimate for total variability (including measurement error) suggested in the record is approximately 15 μg/100g. OSHA has used a standard deviation 9.5 μg/100g in calculating the distribution of blood lead levels at particular air lead levels. This distribution has then been utilized to calculate the incremental benefits of the permissible exposure limit over the other alternatives of 40 μg/m³, 100 μg/m³ and 200μg/m³. The results are found in the benefits subsection of the PEL section.

B. PERMISSIBLE EXPOSURE LIMIT

1. *General considerations.* The final standard establishes a permissible exposure limit (PEL) of 50 μg/m³ averaged over an eight hour period. The decision to establish this PEL was based on consideration of the health effects associated with exposure to lead, feasibility issues, and the correlation of airborne concentrations of lead with blood lead levels that are in turn associated with adverse effects and symptoms of lead exposure.

At the time the proposal was issued, OSHA stated that "in order to provide the appropriate margin of safety, as well as to provide significant protection against the effects, clinical or subclinical, and the mild symptoms which may occur at blood lead levels below 80 μg/100 g it is necessary to set an airborne level which will limit blood lead (PbB) levels to 60 μg/100 g. A maximum blood lead level of 60 μg/100 g corresponds to a mean blood lead level of about 40 μg/100 g" (Ex. 2, p. 45938). Based upon the extensive evidence of adverse health effects associated with exposure to lead, OSHA has determined that in order to provide necessary protection against the effects of lead exposure, the blood lead level of lead workers must be kept below 40 μg/100 g.

In establishing 40 μg/100 g as the maximum blood lead level which the protection of employees and prudence permits, OSHA is mindful of the requirement of the Act that "no employee will suffer material impairment of health or functional capacity . . . for the period of his working life." OSHA has concluded that maintenance of blood lead levels below 40 μg/100 g by engineering and work practice controls of airborne lead will provide protection of workers throughout their working lifetimes. There is a substantial amount of evidence which indicates that the blood lead level of workers, both men and women, who wish to plan pregnancies should be maintained at less than 30 μg/100 g during this period, and this knowledge forms the basis for the action level of 30 μg/m³ established in this final standard which the agency believes will maintain the majority of blood lead levels below 30 μg/100 g.

OSHA recognizes that a PEL of 50 μg/m³ will not achieve the goal of maintaining the blood lead levels in all occupationally exposed workers below 40 μg/100 g. Based on the calculations using the CPA adaptation of the Bernard model, OSHA predicts 0.5 percent of worker blood leads will exceed 60 μg/100 g; 5.5 percent of the workers will have a PbB between 50-60 μg/100 g; 23.3 percent will be between 40-50 μg/100 g; and overall, 29.3 percent of exposed lead workers will have PbB above 40 μg/100 g at any one time when uniform compliance with 50 μg/m³ PEL is achieved. However, this represents a substantial improvement over current industry conditions. The current blood lead level distribution assuming compliance with 200 μg/m³ is approximately (1) greater than 60 μg/100 g, 22.4 percent; (2) 50-60 μg/100 g, 32.6 percent; (3) 40-50 μg/100 g, 28.7 percent; (4) The total above 40 μg/100 g, 83.8 percent.

In establishing 40 μg/100 g as a maximum desirable blood lead level, the Agency is conscious of the fact that the OSHA Act mandates that a standard be set which meets the test of feasibility. OSHA has determined that 50 μg/m³ represents the lowest level for which there is evidence of feasibility for primary and secondary smelting, SLI battery manufacturing, pigment manufacturing, and brass/bronze foundries. The 50 μg/m³ exposure limit is the level which properly balances the questions of feasibility and health effects of lead exposure and most adequately assures, to the extent feasible, the protection of workers exposed to lead. Compliance with this level will provide a dramatic reduction in the number of workers whose blood lead levels are currently greater than 40 μg/100 g, and will virtually eliminate all blood lead levels above 60 μg/100 g.

This level of 50 μg/m³ is achievable almost entirely through engineering and work practice controls, the preferable control strategy. The exposure limit is based upon what can be achieved by the affected industries taken as a whole, using presently available technology or, in some industries, technology looming on the horizon. The industries which will face the greatest difficulties in the implementation of engineering controls will be primary and secondary smelters, pigment manufacturing, brass/bronze foundries and SLI battery manufacturers. For this reason, the requirement for engineering and work practice controls will be phased-in with extended periods of time allotted for compliance in these industries. OSHA has determined that the standard is feasible, and that the PEL of 50 μg/m³ represents the best intersection between maximization of health benefits and feasibility.

2. *Health effects.* In the proposal, OSHA questioned whether both clinial and subclinical effects of exposure should be considered in establishing a standard for lead. OSHA believes the original terms, clinical and subclinical, represent vast over-simplifications of a disease process and, therefore, have avoided their use in this final standard. The subclinical effects described in the health effects section are, in reality, the early to middle stages in a continuum of disease development process. It is axiomatic that the chronic, irreversible stage is preceded initially by an early, relatively mild, and apparently reversible stage of disease. This earliest stage is characterized by varying subjective and/or objective symptoms which may not at first alarm the victim, or present a physician with a clear-cut diagnosis. Nevertheless, this early developmental stage of disease is a pathologial state, and OSHA finds persuasive the arguments for adopting a lead regulation which protects workers from this early consequence of lead exposure. OSHA believes these early stages of the disease process characteized by central nervous system symptoms, behavioral changes, psychological impairment, peripheral nerve damage, anemia, reduced kidney function and adverse reproductive effects represent material impairment of the worker and should be prevented in order to eliminate further development of disabling disease and death.

OSHA must promulgate a standard which prevents occupational disease resulting from both acute and prolonged or chronic exposure to lead; it must likewise guard against the onset, progression or severity of chronic degenerative diseases of aging workers.

The degree of protection to be provided must extend over the full span of a working life and must cover the more susceptible, as well as the more robust members of the exposed group. Since the objective is to limit the latent effects of exposure, as well a immediate illness, the mere absence of illness, or lack of severe clinical signs will not constitute adequate health protection. The PEL must be chosen such that is protects the worker not only from the most overt symptoms of illness, but also from the earliest indications of the onset of disease. The usual medical signs for disturbance, therefore, are wholly inadequate to provide employee protection. These considerations formed the basis of OSHA's interpretation of the health effects data in the record for purposes of establishing a PEL.

a. *Inhibition of heme synthesis.* In establishing the PEL, OSHA evaluated the health effects of lead on heme synthesis. Scientific evidence has established that very low levels of lead inhibits at least two enzymes (ALA-D and ferrochelatase) in the heme synthesis pathway. ALA-D inhibition is observed at PbB levels below 20 μg/100 g. At 40 μg/100 g significant excretion of the substrate of one enzyme, ALA-D, occurs at this PbB level. The build-up of protoporphyrin levels indicates that inhibition of the enzyme, ferrochelatase, also occurs at low PbB levels. Some have argued that these effects are the manifestation of the human body's adjustment to lead. OSHA believes that it is inappropriate and simplistic to describe these changes as internal adjustments. These measurable effects are considered by the agency to indicate the occurrence of disruptions of a fundamental and vital subcellular process, heme synthesis. such processes are not only essential to the production of hemoglobin, they are also vital to the mitochondrial function of all cells.

OSHA believes the evidence indicates a progression of lead's effects starting with the inhibition of specific enzymes, continuing to the measurable disruption of subcellular processes, such as the measurable build-up of heme synthesis products, and eventually developing into the overt symtoms of lead poisoning. Biological variability between individuals will necessarily cause differences in the PbB level at which a particular person will experience each stage in this disease continuum; therefore, at each higher PbB level a greater proportion of the population will manifest each given effect. Given this understanding of the progressive stages of lead's effect, OSHA has concluded that enzyme inhibition indicative of the disruption of heme synthesis is an early stage of a disease process.

Anemia is one of the established symptoms of lead poisoning. That lead-induced anemia occurs above PbB levels of 80 μg/100 g is well established; however, the occurrence of this symptom at PbB levels below 80 has been debated. In evaluating the disease mechanisms of anemia, it was found that lead is an insidious poison which attacks not one, but many, of the subcellular physiological processes. The effects of lead on heme synthesis are considered to play a part in the development of anemia. Studies have associated PbB levels as low as 50 μg/100 g with lowered Hb levels. In particular, Tola's study, which showed a lowering of hemoglobin (Hb) over the length of lead exposure to 50 μg/100 g, and the work of the Mt. Sinai group in secondary smelters which demonstrated reduced Hb in 39 percent of the workers studied whose PbB levels ranged from 40 to 80 μg/100 ml, is considered by OSHA as strong evidence that lead does effect reduced Hb levels at this low PbB range. This implies that there is a lifetime alteration in the oxygen carrying capacity of the blood, in the blood viscosity and potentially in the cardiac work load.

In evaluating the effects of lead on heme synthesis, Piomelli suggested that effects on the blood forming system, such as anemia, are not the most significant clinical effects of heme synthesis disruption nor the earliest. He stated that "a much more important fact is that the alteration of the mechanism of heme synthesis reflects the general toxicity of lead in the entire body." (TR 458)

Evidence indicates that there is disruption of heme synthesis in other tissues of the body following exposure to lead, and that this disruption results in alteration of the process of respiration. While this evidence relates lead's effects on heme synthesis to symptoms throughout the body is far from complete, it is, however, extensive enough to warrant very serious consideration with respect ot the establishment of the standard. OSHA believes this evidence demonstrates that one stage of early lead disease is the disruption of heme synthesis and that the measurable effect of this disruption on the hematopoietic system parallels that which is known to occur in all body tissues at comparably low PbB levels, (below 40 μg/100 g). The disruption of heme synthesis is clearly not the only mechanism by which lead exerts its toxicological effect, but is one mechanism of which we have substantial understanding and can measure.

In reference to the blood forming system, OSHA believes that the effects of lead are a complex progression which begins with discrete biochemical changes and proceeds to overt clinical symptoms. At increasingly higher PbB levels, a significant proportion of the population will suffer more extreme effects. At a PbB level of 40 μg/100 g, a sizable proportion of the population would show measurable effects of the disruption of heme synthesis in the hematopoietic system. A comparable degree of disruption of heme synthesis in the mitochondria would occur. OSHA believes the occurrence of such effects is an unacceptable health impairment.

Piomelli gave an excellent summary of the importance of lead's effects on heme synthesis stating:

> It is my understanding that regulations have the purpose of preventing "material impairment of health". Alterations in heme synthesis do not produce subjective evidence of impairment of health, unless they reach the extreme depression in severe lead intoxication, when marked anemia occurs and the individual feels weak. However, it is not any longer possible to restrict the concept of health to the individual's subjective lack of feeling adverse effects. This is because we know that individuals may get adjusted to suboptimal health, if changes occur slowly enough and also because we now have the ability to detect functional impairments by appropriate tests, much before the individual can perceive any adverse effect. In fact, it is the responsibility of preventive medicine to detect those alterations which may precede frank symptomatology, and to prevent its occurrence. The alterations in heme synthesis caused by lead fulfill, in my opinion, the criteria for material adverse effects on health and can be used to forecast further damage. The depression of heme synthesis in all cells of the body is an effect of far reaching proportion and it is the key to the multiple clincial effects of lead toxicity, which become obvious as the exposure continues (Ex. 57, p. 21).

This does not in any way suggest that the lead effect on heme is the only mechanism of lead disease, but it does suggest that this effect is at least one of the important mechanisms in lead disease. An understanding of the spectrum of effects from subcellular to clinical symptoms is relevant not only to the occurrence of anemia but will also be the expected pattern in lead-induced neurological and renal disease.

OSHA believes that there is evidence demonstrating the impairment of heme synthesis and mitochondrial disruption in tissues throughout the body, and that these effects are the early stages of lead disease in these various tissues. The disruption of heme synthesis measured at low PbB levels is not only a measure of an early hematopoietic effect, it is also a measure which indicates early disease in other tissue. The Agency believes that such a pervasive physiological disruption must be considered as a material impairment of health and must be prevented. PbB levels greater than 40 μg/100 g should, therefore, be prevented to the extent feasible.

b. *Neurological system.* There is extensive evidence accumulated in both adults and children which indicates that the toxicity of lead is manifested in both the central and peripheral nervous systems. The neurologic manifestations of lead intoxication are variable, ranging from acute, chronic, or low level to massive. The location and degree of neurological damage depends on the dose and duration of exposure.

The record in this rulemaking clearly demonstrates that damage occurs in both the central and peripheral nervous systems at blood lead levels lower than previously recognized. Based on this record, OSHA has concluded that the earliest stages of central nervous system disease are recognizable as subjective CNS symptoms and behavioral disorders. These disorders have been documented in numerous scientifically sound investigations. Current information does not provide an indication of a no-effect level. In adults, there is evidence of a dose-response relationship, but the no-effect level remains to be determined. Given the severity and potential nonreversibility of central nervous system disease, OSHA must pursue a conservative course of action. A blood lead of 40 μg/100 g must be considered to be a threshold level for behavioral changes in adults, and to protect against long-term behavioral effects, blood levels should never exceed 60 μg/100 g.

Some of the best and most extensive evidence in the rulemaking record are the data presented which confirm the existence of the early stages of peripheral neuropathy in workers exposed to lead levels below 70 μg/100 g. The evidence demonstrates that there is a statistically significant loss of motor nerve conduction velocity (MNCV) in lead-exposed workers. A dose-response relationship for the slowing of MNCV has been determined, and it is apparent that this slowing occurs in workers whose PbB levels are 50 μg/100 g and above. Whether there are effects as low as 40 μg/100 g is as yet undetermined, although Repko does indicate a slowing of MNCV in the forties. Recently published research indicates edema appears to develop at the same time of onset of degeneration of myelin sheaths of nerve fibers which show reduced MNCV. This pathophysiologic state will grow progressively worse with continued exposure even at PbB levels in the fifties. OSHA believes a clear deficit in the conduction velocity of more than one nerve is an early stage in the development of clinically manifest peripheral nerve damage and disease (neuropathy).

In order to prevent peripheral neuropathy as evidenced by a slowing in NCV's, it is necessary to maintain PbB s below 50 μg/100 g, although if there is to be any margin of safety, a value less than this should be established. This is consistent with OSHA's overall goal of maintaining blood leads below 40 μg/100 g.

Recovery from the effects of chronic lead poisoning may be feasible in some cases if the worker is removed from the source of exposure and therapy is initiated immediately. There are instances, however, when complete recovery is impossible and the pathology is fixed. Even if the worker is removed from the source and therapy initiated, the worker may still experience impairment (Ex. 95 Ref. Cantarow p. 135). In a recent paper describing his results, Dr. R. Baloh, a neurologist at UCLA, questioned the reversibility of nervous system damage:

> Although there are isolated reports of significant improvement in lead induced motor neuron diseases and peripheral neuropathy after treatment with chelation therapy, most studies have not been encouraging, and in the case of motor neuron disease, death has occurred despite adequate chelation therapy.
>
> All of this data reinforces a disturbing clinical impression that nervous system damage from increased lead absorption is only partially reversible, if at all, with chelation therapy and/or removal from further exposure. This is not particularly surprising, however, since experience with other heavy metal intoxication has been similar. Nervous system damage from arsenic and mercury responds minimally to chelation therapy. Apparently, irreversible changes occur once the heavy metal is bound by nervous tissue. Although further study is clearly needed, the major point I would like to make this morning is that there is strong evidence to suggest the only reliable way to treat nervous system damage from increased lead absorption is to prevent its occurrence in the first place. (Ex. 27(7) p. 55.)

OSHA agrees with these concerns regarding irreversibility of neurological disease expressed by Dr. Baloh and therefore must establish a standard which will prevent the development of nervous system pathology at its earliest stages.

c. *Renal system.* During the hearings, one of the most important contributions to the understanding of the adverse health effects associated with exposure to inorganic lead was the elucidation of evidence on kidney disease. In particular, the research of Wedeen and his coworkers, the health hazard evaluation by NIOSH at Eagle Picher Industries, Inc., and the work of the Mt. Sinai group demonstrated that lead exposure is a key etiologic agent in the development of kidney disease among workers occupationally exposed to lead. Unlike the hematopoietic system where changes in heme formation can be detected at early stages, renal disease may only be detected through routine screening after serious damage has occurred. Elevated BUN and S-creatinine are measurable only after two-thirds of kidney function is lost, or upon manifestation of symptoms of renal failure. OSHA agrees with the conclusions of Wedeen: "By the time lead nephropathy can be detected by usual clinical procedures, enormous and irreparable damage has been sustained. The lead standard must be directed towards limiting exposure so that occupational lead nephropathy does not occur." (Tr. 1750) since in this situation "progression to death or dialysis is likely." (Tr. 1732). The record indicates that blood lead is an inadequate indicator of kidney disease development, since rather than being a complete measure of body burden, it is merely a measure of absorption when sampled close to the time of exposure.

Given these conclusions, OSHA must approach the prevention of kidney disease by recognizing the limited usefulness of certain biological parameters. Therefore, OSHA believes any standard established for lead must provide some margin of safety and agrees with Dr. Wedeen that:

> It is therefore the subclinical renal effects, and by subclinical, I mean effects that are not readily detected by the patient or the physician, it is therefore the subclinical effects of lead which should be detected and prevented, since this represents a material loss of functional capacity which has serious adverse health implications. (Tr. 1732) 40 μg/100 ml is the upper acceptable limit to prevent development of a hazardous body burdens lead. (Tr. 1771)

d. *Reproductive system.* The record clearly demonstrates that lead has profoundly adverse effects on the course of reproduction. Prior to conception exposure to lead is responsible for menstrual and ovarian cycle abnormalities in women, decreased libido, impotence and altered sperm formation in men, and lowered fertility and genetic damage in both males and females. Genetic damage may result in spontaneous miscarriage, stillbirth, or in a disease or birth defects in a live born child. There is data which documents that miscarriage and stillbirth may be caused by maternal lead esposure during pregnancy. In fact, lead has been used as a abortifacient. In women exposed to lead, Fhim has reported that the mothers of premature babies had significantly higher mean blood leads than did mothers with normal pregnancies.

There is conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues; lead levels in the mother's blood are comparable to concentrations in the umbilical cord blood at birth. A survey of fetal tissue demonstrated that the transplacental passage of lead becomes detectable at 12 to 14 weeks of gestation, and increases from that point to birth. Therefore, early in pregnancy the fetus may be adversely

affected by maternal lead exposure. Some investigators have suggested that the fetus is most vulnerable to lead during the first trimester. OSHA disagrees with this assertion, but rather believes the fetus is highly vulnerable whatever the stage of development. The fetus is particularly susceptible to neurological damage. In addition, there may also be heme synthesis impairment and renal damage in the fetus. In the newborn child, exposure to lead may continue through the secretion of lead in the mother's milk.

There is little direct data on damage to the fetus from exposure to lead but there are extensive studies which demonstrate neurobehavioral effects in children. OSHA believes that the fetus would be at least as susceptible to heme inhibition and neurological damage as would older children and therefore data on children is relevant to the fetus.

Behavioral disturbances, such as hyperactivity, have been associated with blood lead levels in children as low as 25 μg/100 ml. In general, mild CNS symptoms, behavioral problems, and other neurological signs and symptoms occur around 50 μg/100 ml, but there is evidence of adverse effects at lower PbB levels.

An analysis of the data suggest that in order to protect against lead's adverse effects on the course of reproduction, blood lead levels should be maintained at or below 30 μg/100 ml. The Center for Disease Control, the Toxicology Committee of the National Academy of Sciences and the Environmental Protection Agency recommend that blood lead levels of children be kept below 30 μg/100 ml. Certainly the fetus and newborn should be similarly protected. OSHA recognizes that the PEL of 50 μg/m^3 acting alone will not maintain blood lead levels of persons planning pregnancies or pregnant women below 30 μg/100 ml. When compliance is achieved, the mean blood lead level for a population of lead workers uniformly exposed to the 50 μg/m^3 PEL will be approximately 35 μg/100 ml. OSHA believes that damage to the fetus represents impairment of the reproductive capacity of the lead exposed parent. While OSHA believes that a standard should be set which protects all persons affected—male and female workers, and the fetus—the agency is limited by the requirement that a standard be feasible. However, the standard minimizes adverse reproductive effects from lead by a variety of means including (1) establishing a 30 μg/m^3 action level which will initiate biological and air monitoring, (2) utilizing the provisions of the medical surveillance section, including fertility testing, physician reviews, and medical removal protection to identify and perhaps remove workers who may wish to plan pregnancies or who are pregnant, and (3) insuring through the education and training provisions of the standard that workers are fully informed of the potential hazards from exposure to lead on their reproductive ability, during pregnancy and following birth. Compliance with these provisions of the standard should effectively minimize any risk to the fetus and newborn child, and thereby protect the reproductive systems of both parents.

The record in this rulemaking is clear that male workers may be adversely effected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these standard will minimize risk to all persons and should therefore insure equal employment for both men and women. There is no evidentiary basis, nor is there anything in this final standard, which would form the basis for not hiring workers of either sex in the lead industry.

During the hearings, industry representatives argued that lead exposed workers will not suffer material impairment of health if blood lead levels are below 80μg/100 g. OSHA finds this argument to be unsubstantiated by scientific or medical evidence, and has concluded that it represents an incorrect assertion. It is not based on the sound evidence in the record which demonstrates adverse health effects as low as 40 μg/100 g. The record indicates that adverse signs and symptoms have been observed in workers who were exposed to lead for less than a year.

During the public hearings the vast majority of the physicians who testified supported the view that blood lead levels should be maintained at or below 40 μg/100 g in order to protect against the onset of the early manifestations of disease previously described as subclinical effects. The following physicians supported a PbB level of 40 μg/100 g: Dr. Lillis (Tr. 2700-01), Dr. Needleman (Tr. 1085-86; 1106-07); Dr. Epstein (Tr. 1051-52, 1058-65, 1067-68, 1072, 1073-74, 1104-05); Dr. Lancrajan (Tr. 1771), Dr. Wolfe (tr. 4140), Dr. Teitlebaum (Tr. 374-78), Dr. Bridbord (Tr. 1976-02), Dr. Fishbein (Tr. 2660-61, 2669) and Dr. Piomelli (Tr. 467).

In addition OSHA has carefully scrutinized the extensive evidence compiled by the Environmental Protection Agency (EPA) which led that Agency to establish a national ambient air quality standard of 1.5 μg/m^3 designed to address the problem of lead in the urban environment. The EPA standard was based on the following considerations:

> In establishing the final standard, "EPA determined that of the general population, young children (age 1-5 years) are the most sensitive to lead exposure. In 1970, there were 20 million children in the U.S. under 5 years old, of whom 12 million lived in urban areas and 5 million lived in center cities where lead exposure is the highest. The standard is based on preventing children in the U.S. from exceeding a blood level of 30 micrograms lead per deciliter of blood. Blood lead levels above 30 micrograms are associated with an impairment in cell function which EPA regards as adverse to the health of chronically exposed children. There are a number of other adverse health effects associated with blood lead levels above 30 micrograms in children as well as in the general population, including the possibility that nervous system damage may occur in children even without overt symptoms of lead poisoning." (EPA Press Statement, September 29, 1978.)

These conclusions are consistent with the testimony in this record including the policy statements of the Center for Disease Control (Ex. 2 (15)) and the National Academy of Sciences. These conclusions on exposure limits in the general population and children in particular are relevant to OSHA's final standard for a working population. The testimony of Dr. H. Needleman of Harvard University is relevant here.

> I am one of those who believe that a substantial body of evidence is accumulating that the threshold for significant health effect depends on the avidity, sensitivity and sophistication with which we pursue it and that the lowering of acceptable body burdens in children and adults is scientifically and economically sound.
>
> With the passage of time, the defined acceptable blood level for a child under six has moved from 60—when I began my training in pediatrics not too long ago—to 50 to 40 micrograms per deciliter. The CDC now begins to talk about 20 as the threshold for undue lead exposure. And Professor Zielhuis at the Amsterdam meeting in 1972 recommended an individual limit of 35 micrograms per deciliter and a group average of 20 micrograms per deciliter for children.
>
> There are important differences during the time that the blood brain barrier is being laid down, in that certain enzymes are being induced, but I think that the point that I was trying to generate in that argument, was that in my pediatric experience, when I started training in pediatrics, we said that children with blood leads over 80 were at high risk for the lead poisoning, and now we have been talking about children of 30, 45 or 40, and I think that same argument, deriving out of sharp and clinical and experimental evidence, would apply to the worker that is, that if you look more carefully for evidence of impairment, you are going to find it.
>
> The fact that an adult worker will spill aminolevulinic acid in his urine, at a blood

Vol. 43—No. 225
11-21-78
BOOK 2:
PAGES
54353-54616

federal register

BOOK 2 OF 2 BOOKS
TUESDAY, NOVEMBER 21, 1978
PART II

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

■

OCCUPATIONAL EXPOSURE TO LEAD

Attachments to the Preamble for the Final Standard

to lead-induced renal disease in recent years, and while OSHA recognizes that further research is required to understand fully the disease mechanism, it is also necessary to protect the thousands of workers who are potentially in danger of developing renal disease. The record indicates that blood lead is an inadequate indicator of renal disease development. Dr. Bridbord questioned Dr. Wedeen on the issue of chronicity of exposure and blood lead levels.

Dr. BRIDBORD. Well, looking at a group of workers, currently employed, having a blood lead level on that worker and having some information, that to the best of our knowledge there were no major changes in that particular plant during the past number of years. Would that not be a somewhat better index of what the blood lead levels might have been in the past. Considering too, that these workers are currently employed.

Dr. WEDEEN. Sure I think that the blood level measured close to the time of exposure is probably more reflective. I worry very much, that this may occur after a few months of exposure and the blood lead level may remain the same for the next 20 years, despite the fact that the individual is continually accumulating lead in the body.

Dr. BRIDBORD. Would you think that the chronicity of lead exposure, apart from precisely whether the blood lead was above or below 80 or above or below 60 for example, might be an important factor in determining the eventual development of renal disease in lead workers?

Dr. WEDEEN. Yes. That is just what I meant, that the accumulative effects and the cumulative body burden may be very different from the blood lead level at any moment in time.

In other words, one could certainly imagine that a blood lead level of 80, for 2 years, may be very similar to a blood lead level of 40, for 4 years. I don't have that data, but something like that may well exist in terms of the danger of the different levels of exposure.

Dr. BRIDBORD. Alright.

Particularly, in view of that, and given the requirements of the Occupational Safety and Health Act, that sets standards which protect during the working lifetime, would you have some reservations about a blood lead maximum standard, even at 60?

Dr. WEDEEN. I certainly would. And I think I just expressed the basis for it. You will note that in my recording of these patients, very very few of them had blood lead levels over 80. I just feel that while the blood lead level is maybe better than nothing, it may be very practical. It probably doesn't do the job we are trying to do and certainly not from the physician's point of view, who has seen the individual patient, who may or may not be a current exposure at the level that got his disease (Tr. 1765-1766.)

The lead standard must therefore be directed towards limiting exposure so that occupational lead nephropathy is prevented. The Agency agrees with the views of Wedeen:

I have reported today 19 lead workers who have lost 30 to 80 percent of their kidney function. Since they showed no symptoms and had no routine laboratory evidence of kidney disease, it may be asked why this kidney function loss should be viewed as material damage. Lead nephropathy is important because the worker has lost the functional reserve, the safety, provided by two normal kidneys. If one kidney becomes damaged, the normal person has another to rely upon. The lead worker with 50 percent loss of kidney function has no such security. Future loss of kidney function will normally occur with increasing age, and may be accelerated by hypertension or infection. The usual life processes will bring the lead worker to the point of uremia, while the normal individual still has considerable renal functional reserve. Loss of a kidney is therefore more serious than loss of an arm, for example. Loss of an arm leads to obvious limitations in activity. Loss of a kidney or an equivalent loss of kidney function means the lead worker's ability to survive the biologic events of life is severely reduced. By the time lead nephropathy can be detected by usual clinical procedures, enormous and irreparable damage has been sustained. The lead standard must be directed towards limiting exposure so that occupational lead nephropathy does not occur. (Tr. 1747-1750.)

And OSHA agrees with Dr. Richard Wedeen, that "40 μg/100 ml is the upper acceptable limit" (Tr. 1771) and with Dr. Bridbord who stated "I personally think that a blood lead of 60 is too high to give me assurances that we are really going to protect against these effects." (kidney) (Tr. 1375). That is, while PbB levels are an inadequate measure of occupational exposure (though most agree the best available single measurement) they nonetheless provide a basis for determining body burden when measured over an extended period of time. OSHA believes that maintenance of PbB levels at or below 40 μg/100 ml will reduce the overall dose to the worker, decrease the body burden of lead and prevent sufficient buildup of lead in the kidney to effect renal damage.

(4) *Reproductive effects.* Exposure to lead has profoundly adverse effects on the course of reproduction in both males and females. In male workers exposed to lead there is evidence of decreased sexual drive, degeneration of the testes, impotence, decreased ability to produce healthy sperm, and sterility. During the hearings there was considerable discussion of the evidence submitted by Lancranjan et al. which demonstrated that the reproductive ability of men occupationally exposed to lead is interfered with. Lancranjan reported a significant increase in malformed sperm (teratospermia) among lead-poisoned workmen (blood lead mean 74.5 μg/100 ml) and workmen with moderately increased absorption (blood lead mean 52.8 μg/100 ml). Decreased number of sperm (hypospermia) and decreased motility (athenospermia) were observed not only in the preceding groups but also in those with only slightly increased absorption (blood lead mean 41 μg/100 ml). The authors concluded that these alterations were produced by a direct toxic effect on the male gonads, and that a dose-response relationship exists with respect to teratospermia. The other parameters measured do not show as strong a relationship but are significantly altered over controls. This work is consistent with other earlier literature quoted by Lancranjan.

Epidemiologic studies have pointed out previously both the reduction of number of offsprings in families of workers occupationally exposed to lead and increase of the miscarriage rate in women whose husbands were exposed to lead. Experimental investigations have also shown both a reduction in the number of offspring of laboratory animals and reduced birthweight and survival of progenies of animals fed with diets containing lead. (Ex. 23 (38), p. 400.)

The Lancranjan study is strongly indicative of adverse effects on male reproductive ability at low lead levels, and there is conclusive evidence for a dose-response relationship with respect to teratospermia in these lead exposed workers. In OSHA's view teratospermia represents material impairment of health to the male. OSHA believes that this evidence and other studies support the conclusion that lead exerts markedly adverse effects on the reproductive ability of males.

Germ cells can be affected by lead which causes genetic damage in the egg or sperm cells before conception and which can be passed on to the developing fetus. The record indicates that genetic damage from lead occurs prior to conception in either father or mother. The result of genetic damage could be failure to implant, miscarriage, stillbirth or birth defects.

The record indicates that exposure of women to lead is associated with ovarian cycles, premature birth, menstrual disorders, abnormal sterility, spontaneous miscarriage, and stillbirths. Infants of mothers with lead poisoning have suffered from lowered birth weights, slower growth, and nervous system disorders and death was more likely in the first year of life.

There is conclusive evidence in the record that lead passes the placental barrier. Multiple studies have established that the fetus is exposed to lead because of the passage of lead through the placental membrane. This evidence was uncontroverted during the hearings. The lead levels in the mother's blood are comparable to concentrations of lead in the umbilical cord blood at birth. Transplacental passage becomes detectable at 12-14 weeks of gestation and increases from that point until birth.

Numerous parties to the hearings raised the issue of whether the fetus is the most sensitive organism requiring protection from exposure to lead.

Bridbord, for example, argued that the immaturity of the blood brain barrier in the newborn raises additional concern about the presence of lead in fetal tissues.

The proposed lead standard raised the possibility that "the risk to the fetus from intrauterine exposure to high levels of lead in the mother's blood is maximal in the first trimester of pregnancy when the condition of pregnancy may not be known with certainty" (Ex. 2, p. 45936; Ex. 95.) OSHA agrees with Dr. Vilma Hunt who testified that "the first trimester has not been shown to be the period of highest vulnerability for the fetus." (Ex. 59.) OSHA has concluded that the fetus is at risk from exposure to lead throughout the gestation period, and therefore protection must be afforded throughout pregnancy.

There is little direct data on damage to the fetus from exposure to lead but there are extensive studies which demonstrate neurobehavioral effect in children. OSHA believes that the fetus would be at least as susceptible to neurological damage and heme inhibition as would older children and therefore data on children is relevant to the fetus.

Exposure to lead would be expected to adversely effect heme biosynthesis and the nervous system earliest and most profoundly in the fetus and newborn. Early enzyme inhibition in the heme forming system has been well documented, and the central nervous system has its most significant growth during gestation and the first two years following birth.

Lead is capable of damaging both the central and peripheral nervous system. At high exposures to lead (80 μg/100 ml and above) the central nervous system of children may be severely damaged resulting in coma, cardiorespiratory arrest and death. Symptoms of acute encephalopathy similar to those in adults have been reported in infants and young children with a markedly higher incidence of severe symptoms and deaths occurring in them than in adults. In children once acute encephalopathy occurs there is a high probability of permanent, irreversible damage to the CNS.

There is data which demonstrates that permanent damage to the CNS has occurred in children exposed at low lead levels and in whom no overt symptoms were in evidence. Children whose blood leads levels were 50 μg/100 ml and above have demonstrated mild CNS symptoms including behavioral difficulties. Behavioral disturbances in children such as hyperactivity have been associated with blood lead levels between 25 and 55 μg/100 ml. Animal studies have confirmed these findings. Beattie demonstrated an increased probability of mental retardation in children exposed to lead via maternal ingestion of lead in water. Elevated blood lead levels were found in the retarded children compared to the control group. There appeared to be as significant relationship between blood lead concentration and mental retardation. Mean blood lead for the retarded children was 25.5 μg/100 ml. Water lead concentrations in the maternal home during pregnancy also correlated with the blood leads from the mentally retarded children.

Motor nerve conduction velocity (NCV) decrements indicating early peripheral neuropathy have been reported in children. Early studies showed NCV decrements in children whose blood lead levels were 40 μg/100 g and above.

While a critical review of the literature leads to the conclusion that blood lead levels of 50 to 60 μg/100 ml are likely sufficient to cause significant neurobehavioral impairments, there is evidence for effects such as hyperactivity as low as 25 μg/100 g. Given the available data, OSHA concludes that in order to protect the fetus from the effects of lead on the nervous system, maternal blood lead levels should be kept below 30 μg/100 g. In general, 30 μg/100 g appears to be reasonably protective insofar as it will minimize enzyme inhibition (ALAD and FEP) in the heme biosynthetic pathway and should minimize neurological damage. OSHA agrees with the Center for Disease Control (Ex. 2 (15)) and the National Academy of Sciences (Ex. 86M) that the blood lead level in children should be maintained below 30 μg/100 g. Levels above 30 μg/100 g should be considered elevated.

As previously stated there is conclusive evidence that lead passes the placental barrier thereby causing the fetus to be exposed to lead at comparable levels to the mother. Given this in utero lead exposure the fetus is therefore subject to the adverse effects of lead. It is significant to note that an analysis of human fetal tissue demonstrated the highest concentrations of lead in the bone, kidney, liver, brain, blood, and heart. The distribution of lead within the fetus raises the serious prospect that the fetus is susceptible to lead's adverse effects throughout gestation.

There is limited data on the effects of lead on the fetus but there is more extensive information on the susceptibility of infants and children to neurological damage from lead. OSHA believes that the fetus must be considered at risk to neurological damage from lead. Given the severity of neurological disease and the evidence indicating effects at low lead levels this conclusion raised particularly difficult issues when establishing this final standard. OSHA recognizes that a PbB level is not a measure of body burden, that the fetus would only be exposed during the period of gestation, and given the independent hematopoietic system of the fetus that maternal-cord blood leads may not be an accurate reflection of blood lead level in the fetus. However, even if these considerations may suggest a lessening of risk to the fetus, OSHA believes that blood lead levels of pregnant women should be maintained below 30 μg/100 ml in order to protect the fetus.

In general, OSHA believes that the evidence overwhelmingly indicates that the blood lead levels of both male and female workers who wish to plan pregnancies should be maintained below 30 μg/100 in order to prevent adverse effects from lead on the workers' reproductive abilities. To do this would minimize the risk of genetic damage, menstrual disorders, interference with sexual function, lowered fertility, difficulties in conception, damage to the fetus during pregnancy, spontaneous miscarriage, stillbirth, toxic effects on the newborn and problems with the health development of the newborn or developing child. OSHA cannot guarantee that 30 μg/100 g is a "no effect" level but it would provide marked protection to the fetus and therefore to the reproductive capacity of the worker.

During the hearings there was considerable testimony on reproductive effects in relation to the PEL and equal employment considerations. The basic issue had been raised by OSHA in the proposed lead standard:

> Recent studies of the toxicological effects of exposure to lead indicate certain groups of adult workers may have greater susceptibility to lead intoxication than the general worker population. One such group is female employees of childbearing age. It is known that lead absorbed into the bloodstream of pregnant women crosses the placental barrier and enters the blood of the fetus. This is of great concern because excessive exposure to lead during pregnancy has caused neurological damage in children. As noted in the Academy's report, the risk to the fetus from intrauterine exposure to high levels of lead in the mother's blood is maximal in the first trimester of pregnancy when the condition of pregnancy may not be known with certainty. It has also been established that the umbilical similar to that found in the mother's blood. This raises the serious possibility that the blood lead level in the mother might harm the fetus without producing any clinical symptoms of lead exposure in the mother.
>
> The extensive data on lead intoxication in children indicate that for several reasons, including their rapid growth, children may be susceptible to lead intoxication at lower blood lead levels than adults. The U.S. Public Health Service considered this and other factors when it recommended, in March 1975, that blood lead levels in children be kept below 30 μg/100 g. (Ex. 2, P45936.)

No topics were covered in greater depth or from more vantage points than the subject of women in the lead industry. More than a dozen witnesses testified to this issue; many others offered their views in response to questions; over 400 pages of the transcript of these proceedings were devoted to this issue. Participants in the hearings argued that, given the data demonstrating adverse effects on male reproductive abilities and potential genetic effects in males and females, fertile men were equally at risk as women of childbearing age. Therefore, the standard should be designed to fully protect all exposed workers, male and female.

Dr. Stellman testified as follows:

> In summary it can be stated that there is no scientific justification for placing all women of childbearing age in the category of a susceptible subgroup of the working population. There is sufficient data available to show that a significant proportion of the population is at risk for the effects of exposure to lead, and hence can also be deemed susceptible. Further, if the intent of the OSHA standard is to protect workers from hazards to reproduction there is still no justification for treating women separately from man. (Ex. 72.)

This view was supported by other witnesses (Ex. 92; Ex. 343, 59, 60A). Dr. Hunt, for example, stated:

> There is no evidence to allow a conclusion that women of childbearing age themselves are more susceptible to the adverse effects of lead. The susceptible population is made up firstly of the fetus in utero, actually present in the work environment and secondly the offspring of male and female workers with blood lead levels high enough to alter their genetic integrity. (Ex. 59, p. 26.)

OSHA believes that the record supports the conclusions of Drs. Stellman and Hunt that women of childbearing age exposed to lead are not more susceptible to adverse effects on their reproductive capacities than are male workers. There can be no doubt that the reproductive capability of both males and females is adversely effected by lead.

The susceptibility of the fetus, however, raises the issue of whether OSHA should seek to protect the fetus. OSHA has concluded that damage to a fetus due to parental exposure to lead represents material impairment of the reproductive capacity of the parent involved. Further, OSHA believes that it has the public health responsibility to insure to the degree feasible that a fetus or newborn does not suffer ill effects or diminution of health from parental exposure to lead.

OSHA recognizes that the PEL of 50 $\mu g/m^3$ alone will not maintain all worker PbB levels below 30 $\mu g/100$ g. The mean blood lead level of workers uniformly exposed to 50 $\mu g/m^3$ will be approximately 35 $\mu g/100$ g, and the population blood lead distribution is predicted to be: less than or equal to 30 $\mu g/100$ g, 30 percent; 30-40 $\mu g/100$ g, 40 percent; greater than or equal to 40, 30 percent. When full compliance is achieved with the 50 $\mu g/m^3$ PEL through engineering and work practice controls, however, there will be other factors which will have the effect of lowering these percentages. For example, the predicted distribution does not take into account implementation of the Environmental Protection Agency's standard of 1.5 $\mu g/m^3$ for lead in air in the general environment. Achievement of this level will tend to lower blood lead levels in the entire population thereby having the effect of reducing the baseline PbB levels of workers. Normal job turnover, a factor which will further reduce blood lead levels, is not considered in the foregoing percentages. There are also numerous industries affected by the standard whose exposure levels are intermediate or low and who will be able to lower their exposure levels well below the PEL with a minimum of effort. Finally, the percentage distribution cited assumes uniform compliance with 50 $\mu g/m^3$. When compliance is achieved in a particular plant, however, there will no doubt be many areas throughout the industrial operation where the air lead levels will be substantially below the PEL—therefore further reducing the blood lead levels of the aggregate work force. However, even taking these mitigating factors into account, there will often be a substantial percentage of workers whose blood lead levels exceed 30 $\mu g/100$ g. In recognition of the inability of the PEL alone to protect the reproductive capacity of all workers at all times, the standard includes a variety of additional protective elements designed to minimize reproductive risks. Use of these procedures by concerned employers and by informed workers will provide an acceptable margin of safety for the reproductive capacity of both male and female lead exposed workers. First, the standard establishes an action level of 30 $\mu g/m^3$ to trigger environmental and biological monitoring programs, as well as other medical surveillance procedures. The action level has been set at a point commensurate with the beginning of potential risks to reproductive capacity. Initiation of education and training is also tied to the action level so that workers will be fully informed of the nature of reproductive hazards presented by lead, and how the standard addresses these hazards. Workers have the ability to plan and control when they will parent a child. They can be expected to act responsibly when informed of the reproductive hazards presented by lead, and of the special precautionary measures established by the standard. Environmental monitoring, biological monitoring, and medical records are available to employees, and can be utilized when planning for a family.

The medical surveillance program under the standard provides workers the opportunity, upon request, of obtaining a medical examination or consultation concerning the effects of current or past exposure to lead on the employee's ability to procreate a healthy child. The employee may also obtain a second medical opinion by a physician of his or her choice, at no cost to the employee. As a part of the medical removal protection program, the multiple physician review mechanism may require an employer to implement any necessary special precautionary measures for an employee. For example, the employee might be temporarily provided with a powered air purifying respirator even though the employee would otherwise use no form of respirator. If the employee were currently using a respirator, he or she could, upon request, obtain such a respirator even without the recommendation of a physician. The physician review mechanism is empowered to protect the worker's reproductive capacity by whatever measures are appropriate under the circumstances. Temporary removal of a male or female worker (whether or not pregnant) from substantial lead exposure is one alternative. And, as part of the medical removal protection program, the employee would suffer no loss of earnings, seniority or other employment rights and benefits due to the need to be temporarily removed from lead exposure, or otherwise limited pursant to the standard. The medical surveillance program also offers employees the opportunity to obtain, upon request, either a male fertility test, or a pregnancy test.

The foregoing special precautionary measures incorporate the flexibility needed to address the varied circumstances of individual workers. Adverse health effects both to male and female reproductive capacity can be minimized by the use of these procedures, and, consequentially, an acceptable level of health protection is provided to all workers.

During the hearings there was considerable discussion on whether women of child-bearing age should be excluded from work in the lead industry in order to protect the fetus. Ms. Hricko testified that women of childbearing age had been excluded from employment because "the response of industry has been to 'protect' women workers from lead's reproductive hazards by refusing to hire them or by forcing them to prove that they can no longer bear children" (Ex. 60(a)). There was also testimony which dem-

onstrates that women have and do work in production areas of battery manufacturing (Tr. 1245, 4057, 4506, 4855, 5529, 5898).

While not directly suggesting that all women of childbearing age be excluded from employment in the lead industry the LIA argued that the issue of the fetus should be settled on a case-by-case basis rather than setting a standard which would be protective of the fetus.

> The association, in other words, believes that it is preferable to deal with this very difficult and complicated problem on a case-by-case basis, rather than by setting a standard which, although enormously expensive, would not achieve the desired objective. (Ex. 335, p. 40.)

Dr. Cole elaborated on this issue in his testimony:

> Women, quite rightly, want equal employment opportunity • • • (but) there are many jobs in the lead industry where blood-lead levels simply cannot be kept at levels known to be safe for the fetus.
>
> From a health protection standpoint, there is no feasible solution to this dilemma. However, if it is decided that the commitment to equal employment opportunity overrides the health considerations, then there should be a program which would insure that the female knows the risks, that the employer is protected from liability, and that information is obtained which would help us better to understand the degree of risk.
>
> This program would include fully advising the prospective female employee of the risk to the fetus inherent in the job she wishes, and the carrying out of a full-scale joint Government-industry-labor research program, both retrospective and prospective, of the reproductive consequences of occupational exposure to lead.
>
> As I mentioned earlier, this was proposed to NIOSH (by ILZRO) with the commitment of industry funds in 1975, with no response. It is clear to us, from our conversations that we have had with labor unions, NIOSH, OSHA, and company officials that no one has a truly satisfactory answer to this problem.
>
> We can demand, demonstrate, and agitate all we wish but is will not change the basic facts. And if OSHA decides that it must set a standard so low that it is known to be fully protective of the fetus, then we all must bear in mind that there will be very few jobs, indeed, in the lead industry for either men or women. (Cole 3069-70.)

The lead industry properly acknowledged the risk to the fetus from maternal exposure to lead but did not believe a standard could or should be promulgated which would protect the fetus. The LIA disregards, however, the role that the standard's special protective measures can play in protecting reproductive capacity consistent with continued employment of all people. The impact of the typical industry approach would ultimately lead to the exclusion of women of childbearing age from the workplace.

OSHA disagrees with the LIA conclusions and believes that the final standard can protect reproductive capacity of the parent, which in turn will protect the fetus. The agency has endeavored to set a comprehensive standard which will maximize protection to the male and female worker, to the fetus and to the offspring of workers. OSHA recognizes that not all risk can be entirely eliminated given the constraints of feasibility, but the final standard does effectively minimize reproductive risks. With this in mind, OSHA asserts that an employer who fully complies with this standard has no rational basis for the exclusion of women of childbearing age from the workplace.

c. Clinical effects below 80 μg 100 g. A general discussion of the most severe forms of lead intoxication was given in the preceding sections. Given them overt manifestations of lead intoxication the proposed lead standard proceeded to question at what exposure levels do these symptoms appear:

> A number of studies have sought to relate clinical symptoms and effects caused by lead exposure on workers' blood lead levels. There is little disagreement that the risk of clear-cut clinical symptoms related to exposure increases as blood lead levels rise above 80 μg/100 g. In addition, a number of studies have observed symptoms and effects caused by exposure to lead at blood lead levels below 80 μg/100 g. While 80 μg/100 g is a useful lower range for observed clear-cut clinical symptoms, we do not regard it as a sharp delineation above which clear-cut symptoms occur in all workers and below which clear-cut symptoms do not occur. Further workers with blood lead levels above 80 μg/100 g without clear-cut symptoms may have milder symptoms caused by lead exposure. It should be noted that in evaluating studies which seek to relate blood lead levels to symptoms of lead exposure, it is rarely possible in clinical situations to determine the amount of lead absorbed before the onset of symptoms of lead intoxication. In summary, it is OSHA's judgment that the probability of clinical symptoms of lead intoxication appearing is increased as blood lead levels rise above 80 μg/100 g. There are also data, however, to suggest that such symptoms may occur at blood lead levels under 80 μg/100 g, although perhaps not under 50 μg/100 g.

Throughout the rulemaking period industry representatives have steadfastly maintained that there exists no persuasive evidence to indicate that clinical lead intoxication occurs below blood lead concentration of 80 μg/100 g. (Ex. 335, p. 13.) In support of this contention LIA cites Dr. Robert Kehoe's recent publication.

Dr. Robert Kehoe, perhaps the most highly respected authority on lead intoxication in the world, concluded in an article published only last year (1976):

> It appears that no case of poisoning occurs until the concentration of lead in the blood reaches *at least* 80 μg/100 ml, and most cases of poisoning occur at a level well above this (100-300 μg/100 ml). (Exhibit 294B.) (Emphasis added.)

This is consistent with the view Kehoe expressed 15 years earlier in his Harben Lectures, when he explained that no case of even the mildest type of poisoning has been induced by the absorption of inorganic compounds of lead at blood-lead concentrations below 80 μg/100 g. (Exhibit 5(33).)

This article published only last year by Dr. Kehoe contains only one reference later than 1970 and this is Goyer, R. A. (1971) Lead and the Kidney, Curr. Topics Path. (*in press*). (Emphasis added.) It is apparent that this paper by Kehoe was originally written in 1970 or 1971 and only recently published. It addresses data developed prior to 1971, and does not discuss the more recent, important work in this field.

Dr. Kehoe has maintained that no lead poisoning occurs below 80 μg/100 g. For example LIA quotes Kehoe in their early brief: (Ex. 3(72), p. 19.)

> Experience and the accumulation of voluminous data have spoken for themselves, in proclaiming that cases of lead poisoning occur only when certain limits of concentration of lead in the urine or blood (or both) have been exceeded. *The critical concentration of lead in the blood of child or adult, below which • • • no case of even the mildest type of poisoning has been induced by the absorption of inorganic compounds of lead, is approximately 0.08 mg. (80 micrograms) per 100 grams of whole blood.* (Emphasis added.)

This statement is not accurate with respect to either children or adults, but it is especially troublesome with respect to children. The Center for Disease Control in their statement of March 1975 (Ex. 32(15)) define undue or increased lead absorption as occurring at PbB levels of 30-79 μg/100 g. The committee on Toxicology, National Academy of Sciences agreed with CDC and further stated:

> In order to allow for variation among individuals, the mean blood lead concentrations for groups should not exceed 20 μg/dl. (Ex. 86M.)

In addition, this is consistent with the evidence compiled by the Environmental Protection Agency (EPA) which led that agency to establish a national ambient air quality standard of 1.5 $\mu g/m^3$ designed to address the problem of lead in the urban environment. The EPA standard was based on the following considerations:

> In establishing the final standard, EPA determined that of the general population, young children (age 1-5 years) are the most sensitive to lead exposure. In 1970, there were 20 million children in the U.S. under 5 years old, of whom 12 million lived in urban areas and 5 million lived in center cities where lead exposure is the highest. The standard is based on preventing children in

the U.S. from exceeding a blood level of 30 micrograms lead per deciliter of blood. Blood lead levels above 30 micrograms are associated with an impairment in cell function which EPA regards as adverse to the health of chronically exposed children. There are a number of other adverse health effects associated with blood lead levels above 30 micrograms in children as well as in the general population, including the possibility that nervous system damage may occur in children even without overt symptoms of lead poisoning. (EPA Press Statement, September 29, 1978.)

The basis for the EPA conclusions is found in their Criteria Document, "Air Quality Criteria for Lead" (FEIS Ref. 92).

There are numerous studies showing effects on children and adults below 80 μg/100 g. Statements which are clearly at odds with current data raise serious questions about Dr. Kehoe's overall view of this field as it affects both children and adults. What a person thought to be true in 1960 may not stand up to critical scrutiny today especially given recent advances in the early recognition and detection of disease. Dr. Needleman of Harvard University offered another view during his testimony which OSHA believes is a far more accurate representation of reality:

Knowledge of the toxic effects of lead is almost as old as knowledge of its utility. It is recorded frequently through history and just as frequently ignored. No one quarrels with the evidence that the sequelae of lead doses sufficient to produce clinical cymptomos are found in many organ systems of the body are enduring and often catastrophic. Whether lesser internal doses are important health consequences is a topic of extensive and frequently redundant debate.

Opinion on this question tends to divide in relation to the nature of the individual or institution's sponsorship. Pediatricians and public health specialists are concerned that lesser levels of lead are hazardous while industry and its spokesmen maintain that evidence for low dose effects is faulty and far from persuasive.

I am one of those who believe that a substantial body of evidence is accumulating that the threshold for significant health effect depends on the avidity, sensitivity and sophistication with which we pursue it and that the lowering of acceptable body burdens in children and adults is scientifically and economically sound.

I should like to present some data to support those assertions.

1. Studies of—quote—"subclinical" lead poisoning in children. In 1943, Randolph Byers of my institution followed 20 children who had recovered from lead poisoning, 10 of whom had no evidence on encephalopathy. He found that 10 of the 20 were failing in school, had significant problems in perceptual motor function or were severely behavior disordered. Byers asked then, some 34 years ago, how many children with cognitive or behavioral disorder in the school system were in fact unidentified cases of lead intoxication. That is the burden of my research of the children.

With the passage of time, the defined acceptable blood level for a child under 6 has moved from 60—when I began my training in pediatrics not too long ago—to 50 to 40 micrograms per deciliter. The CDC now begins to talk about 20 as the threshold for undue lead exposure. And Professor Zielhuis at the Amsterdam meeting in 1972 recommended an individual limit of 35 micrograms per deciliter and a group average of 20 micrograms per deciliter for children.

A number of studies of intellectual, perceptual and behavioral consequences of low level lead exposure in children have produced mixed results. Some have found impairment and some have not. Many, if not most of the studies are flawed in that insensitive outcome measures or inadequate measures of internal dose were used.

The import of these studies and others is that if one looks carefully for lead effects in children, you are likely to find them at lower levels of exposure than were formerly held. (Tr. 1077-79.)

There are important differences during the time that the blood brain barrier is being laid down, in that certain enzymes are being induced, but I think that the point that I was trying to generate in that argument, was that in my pediatric experience, when I started training in pediatrics, we said that children with blood leads over 80 were at high risk for the lead poisoning, and now we have been talking about children of 30, 45, or 40, and I think the same argument, serving out of sharp and clinical and experimental evidence, would apply to the worker that is, that if you look more carefully for evidence of impairment, you are going to find it.

The fact that an adult worker will spill aminolevulinic acid in his urine at a blood lead of 40, to me says, that that is a clinical effect of significance. (Tr. 1106-07.)

During the rulemaking proceeding ASARCO submitted a study by Dr. Hine et al. entitled "Assessment of Health of Employees with Different Body Burdens of Lead." (Ex. 142G.) The authors apparently studied 652 employees with 5 or more years of service at six ASARCO locations. An extensive battery of tests were carried out which included blood pressure, measure of weight changes, hematology, blood chemistry, including kidney and liver function tests, urinalysis. The authors stated their conclusions as follows:

The results of this study demonstrated that there were no significant differences in the health of workers with blood lead concentrations between 60 and 80 μg/dl and those whose blood lead concentrations were more than 60 μg/dl. Even though the population studies has been substantially exposed above the newly proposed TLV of 0.10 mg/m³, there have been only a few cases of clinical problems related to the lead exposure, and few, in the opinion of the attending physician, have required chelation therapy for the reduction of the body burden of lead.

Based on these findings, it is our opinion that the current blood lead standard of 80 μg/dl can be kept, unless more new data will support the OSHA proposal. Also, the OSHA recommendation of monthly medical examinations appears to be too rigid. Our data indicate that it is possible to maintain a high degree of employee health with much less frequent examinations, with the frequency increased only if the blood lead concentration is found to be elevated beyond 80 μg/dl. We believe that implementation of this proposal of OSHA would not add any further dimension to the less rigorous protection program employed by ASARCO. (Journal of Occ. Med., 20, pp. 613-17; September 1978.)

Unfortunately the study suffers from problems of design which OSHA finds invalidates the authors conclusions. First, there is no well defined study population. In fact, in one table the results are given in terms of the number of determinations carried out rather than the number of subjects examined and the maximum number of determinations is 387. It is unclear how to compare 652 workers with 387 determinations. For example, out of 652 workers 387 determinations of BUN were made and there were 319 S-creat, but there were only 229 determination of the ratio of BUN to S-creat. The disparity between these numbers is not explained nor do we know whether these determinations were carried out on 100, 200, 387 workers or how many. In other words the study suffers from a serious lack of information, which could bias any conclusion. In addition there appears to have been some bias introduced in the original selection of the study group. During the study itself it is not clear how the subjects are counted. It appears some may be counted once and others several times.

The authors do not indicate whether there was uniformity in the manner in which medical examinations were given at each plant and it appears there was no company policy for general medical examinations. This could have introduced variability into the study. More significantly the laboratory analyses were done in six separate laboratories. Given the quality control problems which have been described in this record this would indicate additional variability may have been added. There are other biostatistical problems relating to the authors use of test of significance, e.g. the choice of two tailed tests and use of probability levels. There are other problems with this work especially with respect to population definition but it suffices to say this was not a well controlled epidemiologic study utilizing a precise methodology. Rather it represents a compilation of data without any well defined study objectives. The data provides no basis for the authors conclusions and accordingly OSHA believes it should be given little if any weight in these proceedings.

Industry representatives during the hearings frequently quoted Dr. Kehoe's conclusions in a totally uncritical fashion thereby raising doubts about the credibility of the argument.

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JUDICIAL SCREENING PANEL

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EQUAL RIGHTS ADVOCATES

ON THE NOMINATION OF ROBERT H. BORK

Committee on the Judiciary
United States Senate

October 19, 1987

This testimony is submitted on behalf of the Federation of Women Lawyers' Judicial Screening Panel, a nationwide network of women attorneys and law professors which has been investigating and evaluating potential nominees to the federal judiciary since 1979, and on behalf of the Women's Legal Defense Fund, the NOW Legal Defense and Education Fund, and Equal Rights Advocates, all of which are public interest legal organizations engaged in litigation, public education and counseling with the goal of securing equal rights for women.[1/] These groups share a deep concern that the federal judiciary, and particularly the Supreme Court, maintain its traditional role as the guarantor of constitutional rights in the struggle for equal justice under law.

Our opposition to the nomination of Robert H. Bork as Associate Justice of the United States Supreme Court stems from our concern that Judge Bork has not demonstrated a commitment to equal justice. On the contrary, his long record as a judge and as an academic demonstrates a consistent and concerted effort to deprive women and other minorities of constitutional rights and protections. Throughout his legal career, he has demonstrated a commitment against equal justice.

1/ The aforementioned groups are deeply indebted to the National Women's Law Center for its excellent report "Setting the Record Straight: Judge Bork and the Future of Women's Rights". We fully endorse the analysis and conclusions contained therein.

Moreover, despite Judge Bork's attempt to paint himself as an advocate of judicial restraint, the record shows him to be a judicial activist. He purports to be guided by deference to both majoritarianism and the intent of the framers of the Constitution. Both sources are said to constrain judicial decisionmaking and to prevent judges from imposing their own values.

In fact, as a review of his opinions shows, he follows these guides only when doing so will allow him to reach a result that accords with his conservative agenda. He is willing to ignore precedent, language, legislative history, and agency interpretations when those sources are in conflict with his own political views. His one-sided activism is well illustrated by his concerted efforts to deny equal justice to women, and this testimony will be devoted to Judge Bork's record in that area.

It should be made clear from the outset, however, that this substantive area of law is not an aberration as far as he is concerned. Rather, it is merely part of a pattern of statutory and constitutional construction which stretches to suppress individual rights, regardless of the language of the legal document he is interpreting or the intent of its drafters. As a general matter, Judge Bork is loath to protect individual rights. A 1987 study of cases in which Judge Bork disagreed with one or more of his colleagues on the D.C. Circuit showed that of 28 cases brought against the Executive Branch by individuals and non-business groups, Judge Bork

voted against the plaintiff in 26. Of 14 cases in which the question was whether the individual should be allowed to bring suit at all, he voted against access to the courts in all 14.[2/] His record on women's rights is equally dismal.

Despite the fact that Judge Bork has not had the opportunity to decide a constitutional case that directly affects the rights of women,[3/] his commitment against equal justice is evident from (1) his writings on constitutional theory; (2) his criticism of Supreme Court decisions that further equal justice; and (3) his statutory decisions affecting women's rights.

Judge Bork's stated theories of constitutional interpretation explicitly preclude almost all protection for women. As this Committee is surely aware, the modern Supreme Court has based all of the constitutional cases which articulate women's rights (whether reproductive rights or antidiscrimination rights) upon either the Bill of Rights or the

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2/ The Judicial Record of Judge Robert H. Bork, (Public Citizen Litigation Group, Washington, D.C.) at 5, 8.

3/ In Cosgrove v. Smith, 697 F.2d 1125, 1145-1146, (D.C. Cir. 1983) (concurring in part and dissenting in part), Judge Bork's opinion did not reach the merits of the gender-based equal protection claim. His opinions in two other constitutional cases, thought not explicitly on women's rights issues, are revealing. See, Dronenburg v. Zech, 741 F.2d. 1388, 1391 (D.C. Cir. 1984), addressing homosexuals' right to equal protection; and Franz v. United States, 712 F.2d 1428, 1438 (D.C. Cir. 1983), where, in an extraordinary "separate statement," Judge Bork denigrated the privacy-based claim of a non-custodial father who sought to discover the whereabouts of his children as "tenuous" and unworthy of constitutional protection.

Fourteenth Amendment. It has done so despite the fact that neither the men in the first Congress who drafted the Bill of Rights, nor the men in the 39th Congress who drafted the Fourteenth Amendment, intended their handiwork to be used to further equal justice for women. These facts can be stipulated by all of us, Judge Bork as well as the groups submitting this testimony.

But here is where Judge Bork's theories, unlike those of the Supreme Court for almost two decades, lead him to deny equal justice to women. Judge Bork says that the intent of the framers is the only legitimate guide to Constitutional interpretation. In his own words:

> It is necessary to establish the proposition that the framer's intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.4/
>
> Original intent is the only legitimate basis for a constitutional decision.5/
>
> Q. What is the proper role of judges in a democratic society?
> A. The quick answer is: to discern the intent of the people who wrote the law they are applying, whether it is constitutional law or statutory law or precedential law.6/

From these three premises -- that equal justice is

4/ "Tradition and Morality in Constitutional Law", Francis Boyer Address to the American Enterprise Institute, at 10.

5/ Address at the University of San Diego Law School, November 18, 1985, reprinted in The Great Debate: Interpreting our Written Constitution, at 43 (Federalist Society: 1986).

6/ McGuigan, An Interview with Judge Robert H. Bork, June 1986 Judicial Notice, at 2.

served primarily under a few constitutional provisions; that those provisions were not intended by their framers to afford equal justice to women; and that the Constitution must be interpreted solely according to the framers' intent -- one reaches the inescapable conclusion that Judge Bork finds virtually no protection for women in the Constitution. His "reasonable basis" equal protection test, articulated for the first time at his confirmation hearings, offers no comfort to women seeking to vindicate their legal rights. It is, in essence, indistinguishable from the "rational basis" test which has never led the Supreme Court to strike down a gender-based discrimination.[7/]

Judge Bork's Constitution would thus extend to women only the right to vote, which is explicitly guaranteed by the Nineteenth Amendment. His Constitution would not protect them -- as the Supreme Court for the last two decades has -- from state laws that discriminate against them and relegate them to the status of second-class citizens: unable to serve on juries, prohibited from attending certain schools, barred from certain professions, denied educational and developmental opportunities because of a lower age of majority, and irrebuttably categorized in adulthood as non-wage-earning homemakers. It would not protect men from laws that deprive them of equal justice by barring them from certain schools or professions, by forcing on them obligations not imposed on

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7/ Transcript, September 16, 1987, at 73-74.

women and by denying them equal rights with regard to their children. And it would deprive women and men of the most basic right of privacy: the right to decide whether and when to have children.

Every obstacle to the achievement of equal justice mentioned above has been invalidated by the Supreme Court, but every one of those cases would be repudiated under Judge Bork's judicial philosophy. Judge Bork's Constitution is thus not the Constitution of 1987, but the Constitution of 1873, when the Supreme Court held that Illinois could prohibit women from becoming lawyers. Justice Bradley wrote:

> Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfil the noble offices of wife and mother. This is the law of the Creator.8/

It is also the law of Robert Bork's Constitution, because his judicial philosophy leads to a single conclusion: the Constitution does not include women.

And indeed, his writings bear out this conclusion. He has written that the Equal Protection Clause of the Fourteenth Amendment, which has become the bastion of equal justice, protects only racial, ethnic and religious minorities 9/ and that the Supreme Court "has no principled way

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8/ Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873).

9/ Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

of saying which non-racial inequalities are impermissible.[10] He has said that "the role that men and women should play in society is a highly complex business . . . [which should be] decided by a democratic process", and is thus off limits for the Court.[11] He has defended a "liberty" to discriminate, and stated that "[t]here is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required."[12]

He has also explicitly criticized many of the Supreme Court cases that form the cornerstone of that Court's doctrinal support of equal justice. The entire line of cases in which the Supreme Court has invalidated gender distinctions, beginning as early as 1971, he has labeled constitutionally unjustified and the result of "sentimentalities":

> When [the Supreme Court Justices] begin to protect groups that were historically not intended to be protected by [the Equal Protection] clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have disabilities laid on them. . . . All of these are nationalizations of morality, not justified by anything in the Constitution, justified only by the

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10/ Bork, Neutral Principles and Some First Amendment Problems 47 Ind.L.J. 1, 11-12 (1971). See also, Speech, Federalist Society, Yale University, April 24, 1982, pt. 2, p. 10; Worldnet Interview, June 10, 1987, p. 12.

11/ McGuigan, "Judge Robert Bork is A Friend of the Constitution" (Interview with Bork), October 1985 Conservative Digest, at 95.

12/ Bork, Neutral Principles and Some First Amendment Problems,47 Ind. L.J. 1, 12 (1971).

sentimentalities or the morals of the class to which these judges and their defenders belong.13/

The cases based on "sentimentalities", which Judge Bork would vote to reverse, include all of the cases in which the Supreme Court has invalidated laws that discriminate on the basis of gender, of illegitimacy, of citizenship status and of mental handicap.

Judge Bork has also repeatedly attacked the line of cases in which the Supreme Court has protected the right of privacy. He did not rest at calling Roe v. Wade "an unconstitutional decision" and "a serious and wholly unjustifiable judicial usurpation of State legislative authority."14/ He has also criticized much earlier and much less politically controversial cases on the right to privacy. Indeed, at several points during his confirmation testimony, he reiterated his view that he can find no right of privacy in the Constitution. (See, for example: Transcript, September 15, 1987, at 136; September 16, 1987, at 158-161.)

He has called the decision in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court held that married couples cannot be forbidden from using contraceptives in the

13/ "Federalism and Gentrification," Address to the Federalist Society (April 1982) (quoted in National Women's Law Center, "Setting the Record Straight", at 17).

14/ Testimony of Robert Bork before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the United States Senate, 97th Cong., 1st Sess, on S.158, Serial No. 8-97-16, at 310, 315 (1982).

privacy of their own bedroom, "utterly specious", "unprincipled", and "intellectually empty".[15/] He has said that two cases from the 1920's, which protected a parent's right to direct his or her children's education, were "wrongly decided."[16/] One of these cases struck down a state law that prohibited any child from studying the German language in school; the other invalidated a law that required all children to attend public school, and prevented parents from sending their children to a religious private school.[17/] He has indicated that he would have upheld a state law, invalidated by the Court in 1942, that required the surgical sterilization of certain convicted felons.[18/]

There are other privacy cases on which he has not explicitly commented, but which would also fall under his logic. These include Loving v. Virginia, 388 U.S. 1 (1967), invalidating a statute that prohibited interracial couples from marrying; Moore v. City of East Cleveland, 432 U.S. 494 (1977), striking down a law which operated to prohibit a grandmother from sharing her home with her two grandsons;

15/ Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 9, 11-12 (1971).

16/ Id. at 11.

17/ Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

18/ Skinner v. Oklahoma, 316 U.S. 535 (1942), criticized in Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 12 (1971).

Boddie v. Connecticut, 401 U.S. 371 (1971), which invalidated a law that limited the right of indigent couples to obtain a divorce; and Zablockie v. Redhail, 434 U.S. 374 (1978), which struck down a law placing restrictions on the right of a non-custodial parent to remarry.

Thus both Judge Bork's judicial philosophy and his expressed views on gender cases demonstrate that he would, if confirmed, turn the clock back at least to 1873 and repudiate many of the Supreme Court's decisions that further equal justice. There is no doubt that he would vote to reverse such cases. He has stated explicitly and repeatedly that the doctrine of stare decisis does not apply to wrongly decided constitutional decisions:

> For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the Court.19/
>
> I would think that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy.20/
>
> [C]onstitutional doctrine should continually be checked, not just against words in prior doctrines, but against known constitutional philosophy.21/

19/ Hearings before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess, on the confirmation of Robert H. Bork to be a judge of the United States Court of Appeals for the District of Columbia Circuit, Serial No. J-97-52, at 13 (1982).

20/ Remarks at the First Annual Lawyers Convention of the Federalist Society, at 126 (1987).

21/ Barnes v. Kline, 759 F2d 21, 67 (D.C. Cir. 1985) (Bork, J., dissenting).

> I don't think that in the field of constitutional law, precedent is all that important....[I]f you become convinced that a prior Court has misread the Constitution, I think it's your duty to go back and correct it....I think the importance is what the Framers were driving at, and to go back to that.22/

Where overruling even settled precedent is concerned, Judge Bork is an avowed activist. He would thus vote to overrule virtually all of the cases in which the Supreme Court has furthered equal justice.[23/]

Moreover, because President Reagan has had the opportunity to appoint or promote three other extremely conservative judges, Judge Bork's vote would be the deciding vote in many of these cases. Of the cases in the last two terms in which the Supreme Court unequivocally demonstrated a commitment to equal justice in the gender context, fully half were decided by a 5:4 vote with Justice Powell in the majority. If Judge Bork had been on the Court instead of Justice Powell, those cases would have gone the other way. If Judge Bork is confirmed, those and other issues <u>will</u> be resolved to deny equality to women.

Judge Bork's commitment against equal justice is equally evident in his opinions construing statutes. Just as his constitutional writings indicate a willingness to ignore

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22/ Transcript, September 18, 1987, at 100-101. (airing tape of Canisius College speech of 1985)

23/ A list of constitutional cases that further equal justice and that are inconsistent with Judge Bork's stated philosophy is attached as an appendix.

precedent, his statutory decisions show that in order to reach particular results he will selectively ignore both legislative history and administrative agency interpretations.

Judge Bork consistently interprets broad statutes narrowly, in order to deny to women the very protection those statutes were designed to afford them. He does so regardless of the language or the legislative history of the statute. For example, in Planned Parenthood v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), he accorded great deference to the Department of Health and Human Services -- virtually ignoring the legislative history of the operative statute -- in suggesting that HHS had authority to promulgate a rule requiring Planned Parenthood and others to notify a minor's parents before distributing contraceptives to her. The legislative history of the statute clearly showed, as the majority recognized, an intent to remove as many obstacles as possible from adolescent access to contraceptive assistance.

Similar in its flagrant disregard of the language of the statute was Judge Bork's opinion in Oil, Chemical and Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir 1984). In that case, the Secretary of Labor had determined that American Cyanamid's policy of firing women who could not prove they had been surgically sterilized violated the Occupational Safety and Health Act of 1970. The Occupational Safety and Health Review Commission found no violation. Judge Bork's opinion affirmed that judgment,

despite the fact that the statute required employers to furnish a workplace "free from recognized hazards." Ignoring both the language of the statute and the legislative history, Judge Bork found that sterilization was not a "recognized hazard." In the process, he indicated his disdain for women's reproductive rights: he characterized the company's policy of firing women who did not have themselves surgically sterilized as "[choosing] to let women decide for themselves which course was less harmful to them." His comments on the case at his confirmation hearing were similarly insensitive:

> And I suppose the five women whose chose to stay on that job with higher pay and chose sterilization -- I suppose that they were glad to have the choice....24/

In other cases, he has ignored agency determinations where they are not in accord with his own views. His construction of Title VII of the 1964 Civil Rights Act, which (among other things) forbids gender discrimination by employers, has been narrow and tortured, and often inconsistent with both the clear language and the EEOC interpretation of the statute.

In Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), Judge Bork dissented from the denial of an en banc rehearing in a case involving sexual harassment in the workplace. The appellate panel's recognition of a cause of action for sexual harassment under Title VII of the 1964

24/ Transcript, September 18, 1987, at 450.

Civil Rights Act was then unanimously affirmed by the United States Supreme Court in an opinion by then-Associate Justice Rehnquist.

In contrast, Judge Bork's crabbed view of sexual harassment suggests that it is not prohibited discrimination at all. "Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.'" (760 F.2d at 1333 n.7, emphasis added). He further trivializes the woman's experience by labeling the supervisor's unwelcome sexual advances toward his subordinate as "dalliance" and "sexual escapades."

Judge Bork's dissent also advocated a more stringent standard of proof for such cases, a standard which was unanimously rejected by the Supreme Court. In his view, the woman's "voluntary" participation in a sexual relationship with her supervisor is a complete bar to her claim of sex discrimination. The Supreme Court, however, held that her capitulation is no defense if the advances were unwelcome -- that is, her conduct was out of fear for her job.

In another Title VII case he took the unprecedented step of issuing a separate statement in a case in which he was not even on the panel, indicating how he would have voted on an issue that was not raised either by the parties or by the panel opinion. (So much for judicial restraint.) In that case, King v. Palmer, 778 F.2d 878 (D.C. Cir. 1986), Judge Bork opined that Title VII did not prohibit a supervisor from promoting one woman rather than another solely because

of the supervisor's sexual relationship with the woman who was promoted. Judge Bork apparently does not believe that conditioning employment benefits on a woman's willingness to engage in sexual relations with her supervisor constitutes sex discrimination.

* * * * * * * * *

Because Judge Bork has repeatedly argued that women are not entitled to the protections of the Constitution, has indicated that would overrule those cases in which the Supreme Court has demonstrated its own commitment to equal justice, and has engaged in a pattern of statutory construction that denies to women the protections accorded them by Congressional action, we strongly oppose the confirmation of Judge Robert H. Bork as Associate Justice of the Supreme Court. Judge Bork's demonstrated opposition to equal justice should disqualify him from that position, and we urge the Judiciary Committee and the Senate to oppose his confirmation.

APPENDIX

Supreme Court constitutional cases in furtherance of equal justice that would be overturned under Judge Bork's judicial reasoning and philosophy, if his views were to prevail.

I. CASES PRIOR TO 1954:

1. Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a law that prohibited schools from teaching the German language)

2. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a law that prohibited parents from sending their children to private schools)

3. Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a law that authorized the sterilization of certain felons)

II. WARREN COURT CASES:

4. Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a law that prohibited the distribution of contraceptive devices to married couples)

5. Loving v. Virginia, 388 U.S. 1 (1967) (invalidating anti-miscegenation statute)

6. Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating a law that denied illegitimate children the right to sue for the wrongful death of their mother)

7. Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968) (invalidating a law that denied a mother the right to sue for the wrongful death of her illegimate child)

III. BURGER COURT CASES:

8. Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating a law that restricted divorces to those couples who could afford to pay court fees)

9. Reed v. Reed, 404 U.S. 71 (1971) (invalidating a law that mandated a preference for a man over a woman when two equally qualified individuals sought to be appointed as administrator of an estate)

10. Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a law that prohibited the distribution of contraceptives to unmarried individuals)

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11. Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating a law that denied the father of illegitimate children the right to a hearing prior to their adoption by another person)

12. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidating a law that denied workers' compensation benefits for parental injury to some illegitimate children)

13. Gomez v. Perez, 409 U.S. 535 (1973) (invalidating a law that required the fathers of legitimate children, but not the fathers of illegitimate children, to support their children)

14. Roe v. Wade, 410 U.S. 113 (1973) (invalidating a law that prohibited most abortions)

15. Doe v. Bolton, 410 U.S. 179 (1973) (invalidating a law that imposed various procedural requirements on women seeking abortions)

16. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (invalidating a program that denied welfare benefits to otherwise eligible families if they contained illegitimate children)

17. Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a law that allowed automatic dependency allowance for married servicemen, but that required servicewomen to prove that they provided more than half their husband's support in order to qualify for dependency allowance)

18. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (invalidating rules that required pregnant teachers to take mandatory maternity leaves of several months)

19. Jiminez v. Wienberger, 417 U.S. 628 (1974) (invalidating a federal law that denied Social Security Act benefits to some illegitimate children)

20. Taylor v. Louisiana, 419 U.S. 522 (1975) (invalidating a state practice of automatically exempting women from juries unless the woman waived her exemption)

21. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating a law that provided certain Social Security death benefits to widows but not to widowers)

22. Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a law that set the age of majority, at which time parental support obligations ceased, at 18 for females and 21 for males)

23. Turner v. Department of Employment, 423 U.S. 44 (1975) (invalidating a law that declared a pregnant woman ineligible for unemployment compensation from twelve weeks before the expected birth until six weeks after birth)

24. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (invalidating a law that conditioned availability of abortions on parental consent for minors and spousal consent for married women, and that prohibited saline abortions after the first twelve weeks)

25. Bellotti v. Baird, 428 U.S. 132 (1976) (invalidating a law that required a minor to obtain the consent of her parents or a court in order to obtain an abortion)

26. Craig v. Boren, 429 U.S. 190 (1976) (invalidating a law that set the drinking age for "3.2 beer" for women at 18 and for men at 21)

27. Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating a law that required widowers, but not widows, to prove dependency in order to obtain Social Security survivor's benefits)

28. Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating a law that permitted illegitimate children to inherit by intestate succession from their mothers, but not from their fathers)

29. Moore v. City of East Cleveland, 431 U.S. 494 (1974) (invalidating a law that operated to prohibit a grandmother from sharing her home with her two grandsons)

30. Carey v. Population Services International, 431 U.S. 678 (1977) (invalidating a law that permitted only pharmacists to sell even nonmedical contraceptive devices and prohibited the sale of all contraceptive devices to minors under 16)

31. Zablockie v. Redhail, 434 U.S. 374 (1978) (invalidating a law that prohibited a non-custodial parent with child support obligations from remarrying without court permission, which could be granted only if the parent demonstrated both compliance with the support obligations and the unlikelihood that the children would become public charges)

32. Colautti v. Franklin, 439 U.S. 379 (1979) (invalidating a law that required doctors performing abortions to determine whether the fetus was viable and to take steps to deliver it alive)

33. Orr v. Orr, 440 U.S. 268 (1979) (invalidating a law that permitted courts to require alimony payments only by husbands, not by wives)

34. Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a law that allowed the mother, but not the father, of an illegitimate child to block the child's adoption)

35. Califano v. Westcott, 443 U.S. 76 (1979) (invalidating a law that provided AFDC benefits if children lost parental financial support due to unemployment of their father, but not if they lost parental financial support due to unemployment of their mother)

36. Bellotti v. Baird (II), 443 U.S. 622 (1979) (invalidating a law that required a minor to obtain parental consent before obtaining an abortion)

37. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (invalidating a workers' compensation law that provided death benefits to a widow automatically, but to a widower only if he could prove incapacity or actual dependence on his deceased spouse's earnings)

38. Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding minority set-aside provision for federal contracts)

39. Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating a law that gave a husband, but not a wife, unilateral authority to dispose of community property without spousal consent)

40. Mills v. Habluetzel, 456 U.S. 91 (1982) (invalidating a law that required illegitimate children to bring paternity suits prior to their first birthday or lose the right to paternal support)

41. Plyler v. Doe, 457 U.S. 202 (1982) (invalidating a statute that denied public education to illegal alien children)

42. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (invalidating a state policy that excluded men from a state nursing school)

43. Akron v. Akron Center for Reproductive Health, 462 U.S. 426 (1983) (invalidating a law that imposed various procedural requirements on women seeking abortions, including that second-trimester abortions be performed in a hospital, that doctors recite a litany of emotional and physical complications and describe fetal development, and that women wait 24 hours after giving consent)

44. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (invalidating a law that required that second-trimester abortions be performed in a hospital)

45. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating zoning regulations that prohibited operation of a group home for the mentally retarded)

46. Thornburgh v. American College of Obstetricians and Gynecologists, 54 U.S.L.W. 4618 (1986) (invalidating various procedural restrictions on abortion)

IV. REHNQUIST COURT CASES:

47. U.S. v. Paradise, 55 U.S.L.W. 4211 (1987) (upholding an affirmative action plan for black state employees)

48. Johnson v. Transportation Agency, 55 U.S.L.W. 4379 (1987) (upholding an affirmative action plan for female state employees) (majority upheld against both statutory and constitutional challenge; Bork would reverse on statutory grounds)

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SCHOOL OF LAW DAVIS, CALIFORNIA 95616

October 5, 1987

Honorable Joseph Biden
Chairman, The Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Enclosed is a memorandum entitled "The Lawfulness of Robert Bork's Firing of the Watergate Special Prosecutor," which we would like to have included as a part of the record of the Committee's hearings on Judge Bork's nomination as Associate Justice of the Supreme Court.

The firing of Archibald Cox was a critical event in the life of the nation, widely viewed both at the time and now as an attempt by President Nixon to place himself above the law. As the single most important event in his legal career, we believe that Robert Bork's role in this event merits close examination by the Committee in its consideration of Judge Bork's nomination.

The memorandum concludes that Robert Bork's firing of the Special Prosecutor was unquestionably unlawful and that the illegality was not a mere technicality but a serious and lasting breach of law.

The memorandum also concludes that Robert Bork failed to discharge three important duties that he had as Acting Attorney General. These duties were to be certain that the firing would not interfere with the Watergate investigation and prosecution, the duty to advise President Nixon about the important legal issues involved, and the duty to ensure that his own acts in firing the Special Prosecutor were lawful.

The principal arguments that Robert Bork has put forward on the question of legality are that (1) President Nixon's order to fire Cox overrode a departmental regulation that the Supreme Court has said had "the force of law" and (2) any illegality involved was just a technicality and "not ...important."

The first argument, that President Nixon had authority to override a duly promulgated regulation having "the force of law," is an extreme assertion of Presidential power that has been explicitly rejected by the Supreme Court. The second argument trivializes a regulation governing a matter of vital importance that had been developed through extensive negotiation with both the Special Prosecutor and the Senate Judiciary Committee.

These views were asserted both in 1973 and in the recent hearings before the Committee.

Respectfully submitted,

Floyd Feeney
Professor of Law
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THE LAWFULNESS OF ROBERT BORK'S FIRING OF THE WATERGATE SPECIAL PROSECUTOR

Submitted to the Judiciary Committee
of the United States Senate

October 6, 1987

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The Lawfulness of Robert Bork's Firing Of the Watergate Special Prosecutor

October 20, 1973, was a Saturday five months after the appointment of Watergate Special Prosecutor Archibald Cox and three months after Alexander Butterfield told the Senate Watergate Committee about the White House taping system. In an attempt to prevent Special Prosecutor Cox from proceeding to ensure that he comply with a court order to turn nine tapes over to Judge Sirica, President Nixon on this day ordered Attorney General Elliot Richardson to fire Cox.

Rather than comply, Richardson resigned, stating that he was bound by "firm and repeated commitments" to the Senate Judiciary Committee "to assure the independence of the special prosecutor" and to remove him from office only for "extraordinary improprieties." Given the same order, Deputy Attorney General William Ruckelshaus also refused, saying that "my conscience will not permit me to carry out your instruction."

Almost immediately President Nixon turned to Robert Bork, the Solicitor General and third in command in the Department of Justice. Directed to fire Cox, Bork signed a letter doing so.

Both then and now the firing of Archibald Cox was widely viewed as an attempt by President Nixon to place himself above the law, one of the severest threats to Constitutional governance in the history of the nation.

As the single most important act of his legal career, Robert Bork's critical role in the firing merits close examination. This paper addresses two central questions:

(1) Whether Bork's firing of Cox was lawful?

(2) Whether, in complying with President Nixon's order, Bork gave proper consideration to lawfulness and other duties entrusted to the Attorney General?

Bork's firing of Cox violated a departmental regulation providing that the Special Prosecutor could be removed only for "extraordinary improprieties." Because the Senate Judiciary Committee was promised that this regulation would be a "matter of law" and because the Supreme Court in United States v. Nixon held that it did have "the force of law," this paper concludes that Bork's firing of Cox was unquestionably illegal.

Under any view, Bork's firing of Cox involved serious legal questions. Before taking the extremely serious step of firing the Special Prosecutor, the paper concludes that Bork, as the chief legal officer for the Executive Branch, had a duty to consider carefully the effect of the firing on the Watergate investigation, to advise President Nixon about the serious legal issues involved and to ensure the legality of his own actions. Bork's testimony indicates that he failed to discharge these duties. This failure ill served both President Nixon and the nation.

I. THE FACTUAL BACKGROUND

The burglary of the Democratic National Headquarters at the Watergate which set in motion the events that led eventually to the firing of Watergate Special Prosecutor Archibald Cox and the resignation of President Nixon occurred on June 17, 1972.

With the beginning of the trial of the Watergate burglars before U.S. District Court Judge John Sirica on January 8, 1973, public interest grew rapidly. On February 7 the Senate voted to create a Select Committee to investigate the whole affair. Public attention heightened further on March 23, when Judge Sirica, while sentencing the Watergate burglars, read a letter from James McCord claiming that additional persons were involved and that he and the other defendants had been pressured to plead guilty. On March 29 Senators Packwood and Mathias called for the appointment of a special prosecutor.

On April 30, President Nixon announced the resignation of Attorney General Richard Kleindienst and key aides H.R. Haldeman, John Ehrlichman and John Dean. To help restore public confidence President Nixon also announced the appointment of then-Defense Secretary Elliot Richardson to serve as the new Attorney General. The President stated that Richardson would be in "full charge" of the Watergate investigation and that he would have authority to appoint a special prosecutor.

On May 7, two days before his confirmation hearings were to begin before the Senate Judiciary Committee, Richardson announced his intention to appoint a special prosecutor. On May 9 the hearings began. Lasting six days and consuming 287 pages of printed record, these hearings were highly unusual for a nomination involving a sitting cabinet officer.

The Committee's central concern (occupying over 250 pages of the hearings) was Watergate and the independence and powers of the special prosecutor. Not satisfied with

Richardson's initial proposals, the Committee insisted on greater powers and more independence. Some members believed that the special prosecutor should be created by statute (bills to this effect had already been introduced). Richardson assured the Committee that the President was behind his plan 100 percent. Richardson also said that he wanted his selection as special prosecutor approved by the Senate Judiciary Committee.

On May 18, the day after the Senate Watergate Committee began its public hearings, Attorney General-designate Richardson announced his intention to appoint Archibald Cox as special prosecutor. On May 21 Richardson and Cox appeared together before the Senate Judicary Committee. Richardson presented a revised set of the guidelines that he had worked out with the Committee and with Cox for the conduct of the Special Prosecutor's office.

These guidelines contained a number of highly unusual provisions. Two of these are of special relevance to the question of whether Robert Bork's firing of the Special Prosecutor was lawful. They are:

> (1) The standard for discharge. Rather than the usual standard of discharge for cause, the guidelines provided that the Special Prosecutor could be discharged only for "extraordinary improprieties."
>
> (2) The standard for termination of the guidelines. Rather than the usual standard which allows administrative regulations to be amended or revoked at any time by the issuing authority, the guidelines provided that the Special Prosecutor would carry out his responsibilities "until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself."

Toward the end of Richardson's confirmation hearings, after the extensive negotiations discussed above, Senator Mathias asked Richardson whether he would consider publishing the guidelines in the Federal Register "in the manner in which departmental regulations are published."

Attorney General-designate Richardson replied that he intended to do so in order to give the regulations the effect of law. He said:

> That is what I expected to do, because they to a degree supersede the regulations that provide for delegation, for example, to the Assistant Attorney

General for the Criminal Division in certain respects, and so therefore, the most effective way of making sure that they do, as a matter of law, supersede existing regulations, is to give them the same legal status through publication in the Federal Register.

On May 23 the Committee reported Richardson's nomination favorably and the Senate confirmed his appointment. On May 25 Archibald Cox assumed his duties as Watergate Special Prosecutor.

On June 4 Attorney General Richardson, as he had promised the Senate Judiciary Committee, promulgated the previously negotiated guidelines as a regulation and published it in the Federal Register.[1]

On July 13 Alexander Butterfield informed the Senate Watergate Committee staff about the White House taping system and on July 16 testified publicly about this system. On July 18 Archibald Cox wrote the White House, requesting nine tapes needed for his investigation. On July 23, Judge Sirica, at Cox's request, issued an order to show cause why the tapes should not be produced.

On July 26 White House attorneys notified Judge Sirica that President Nixon would not deliver the tapes because of executive privilege. On August 29 after a hearing Judge Sirica ordered the President to turn over the tapes. On September 10 the President appealed.

On October 12, the U.S. Court of Appeals for the District of Columbia Circuit upheld in modified form Judge Sirica's order directing President Nixon to turn over the tapes. Three days later the White House proposed that it give the court a summary of the tapes, verified by Senator Stennis as a neutral third party, in lieu of the tapes. After several days discussion and some exchange of correspondence between Cox, Richardson and the White House, the White House attorneys concluded that no agreement could be reached. On Friday, October 19, the President announced on national television that he would not appeal the Court of Appeals ruling and that he would turn over a verified summary to the court. By letter he also directed Richardson to order Cox not to seek tapes, notes or memoranda of Presidential conversations. Rather than carry out this order Richardson wrote to the President around noon on Saturday, October 20, that he could not do so in light of the undertakings he had made to the Senate.

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[1] 38 F.R.14688. See Appendix A.

At 1 pm on Saturday, October 20, Cox held a televised press conference to respond to President Nixon's statement. Pointing out that summaries might not be admissible in court and that the order issued by Judge Sirica and upheld by the U.S. Court of Appeals required that the tapes themselves be turned over, Cox told the press that he planned to ask the courts to require the President to supply the actual tapes.

Within hours President Nixon directed Richardson to fire Cox. Richardson refused to do so and resigned, stating that he was bound by "firm and repeated commitments" made "at many points throughout" his confirmation hearings before the Senate Judiciary Committee "to assure the independence of the special prosecutor" and to remove him from office only for "extraordinary improprieties." Given the same order by telephone shortly after Richardson had met with the President around 4:45 pm, Deputy Attorney General Ruckelshaus also refused to fire Cox. Tendering his resignation, he said that "my conscience will not permit me to carry out your instruction to discharge Archibald Cox" and that "my "disagreement with that action at this time is too fundamental to permit me to act otherwise."

Almost immediately President Nixon turned to Robert Bork, the Solicitor General and third in command in the Department of Justice. Although Bork had not previously been involved in the immediate dispute with Cox, President Nixon by letter ordered Bork "to discharge Mr. Cox immediately" and to "take the necessary measures to abolish the Office of Special Prosecutor." Bork agreed, and later that evening signed a letter--reportedly drafted by White House legal consultant Charles Alan Wright--notifying Cox that he was discharged.

On Monday, October 21 (a legal holiday), Bork issued an order rescinding the regulation promulgated by Attorney General Richardson which established the Special Prosecutor. This order stated that the rescission was "retroactively effective." This order was published in the Federal Register on the following day, October 22.

II. THE DISPUTE ABOUT LEGALITY

A. The Lawsuit

On Monday, October 21, the same day that Acting Attorney General Bork, rescinded the regulation establishing the Special Prosecutor, Ralph Nader announced his intention to file a suit in the federal district court challenging the firing as illegal on the ground that the discharge violated the regulation. Senator Frank Moss, Reprepresentative Bella

Abzug and Representative Jerome Waldie joined in the suit. Archibald Cox, however, did not join. At a preliminary hearing Judge Gesell ruled that Nader lacked standing to contest the firing, but that the members of Congress had the standing necessary to sue.

On November 14 Judge Gesell ruled that the firing was illegal. His ruling had three principal prongs:

> (1) The initial firing was illegal because Acting Attorney General Bork had failed to follow the regulation which said that the Special Prosecutor could be fired only for "extraordinary improprieties."
>
> (2) The attempted rescission of the regulation on October 22 was ineffective because the Acting Attorney General had failed to follow the requirement that the Special Prosecutor remain on the job until the Special Prosecutor agreed that it was done.
>
> (3) The reinstatement of the regulation after the appointment of Leon Jaworski as Special Prosecutor showed that the attempted revocation of the regulation was an "arbitrary and unreasonable" "ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor."

On February 14 the Department of Justice appealed Judge Gesell's ruling. On August 20, 1975, after President Nixon had resigned, the U.S. Court of Appeals dismissed the appeal as moot and on October 29 the district court on remand vacated the judgment. Nader v. Bork, 366 F.Supp. 104 (D.D.C. 1973), appeal dismissed as moot (No. 74-1260, D.C.Cir. Aug.20 and Oct. 22, 1975), vacated on remand (No. 1954-73, D.D.C. Oct. 29, 1975).[2]

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[2] On August 8, 1974, the day that President Nixon resigned, the plaintiffs moved to dismiss the appeal on the ground that the July 24 decision of the Supreme Court in Nixon v. United States upholding the powers of the special prosecutor and requiring the President to turn over additional tapes had rendered the issues in the suit moot. On August 29, the Government moved for leave to move for a summary reversal in the case. On January 22, 1975, the Government's motion was denied. On August 20, 1975, the court granted the plaintiff's motion to dismiss as moot. On October 1, the Government moved for a rehearing en banc. On October 22, the court amended its order of August 20 to

B. Judge Gesell's Opinion

Because it was vacated, Judge Gesell's judgment is technically not a decision with the force of a legal ruling. As the opinion of the judge who heard the arguments and decided the case, however, Judge Gesell's opinion is the logical starting point in considering whether the firing was lawful.

Judge Gesell began by noting that Cox was not appointed by the President and did not serve at the President's pleasure. In the absence of any limitation imposed by Congress the Attorney General would ordinarily have "the authority to fire Mr. Cox at any time and for any reason." In this particular instance, however, the Attorney General had chosen to limit his own authority by promulgating a regulation providing that the special prosecutor was to be discharged only for "extraordinary improprieties." Citing two cases in which the Supreme Court had held that an Executive department may not discharge one of its officers in a manner inconsistent with its own regulations, Judge Gesell stated: "It is settled beyond dispute that under such circumstances an agency regulation has the force and effect of law, and is binding upon the body that issues it."

Judge Gesell then dealt with the argument that even if the initial discharge was unlawful, the subsequent revocation of the regulation and the abolition of the office of special prosecutor on October 22 was legal and effectively discharged Cox at that time. Judge Gesell concluded that this argument was also "without merit." While an agency generally has wide discretion in revoking its own regulations, the Attorney General had voluntarily limited his own discretion by issuing a regulation that provided that the special prosecutor would continue to carry out his responsibilities "until such time, as in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself."

Judge Gesell said that he saw no reason why such a regulation was not valid but that even if he were to find this kind of limitation invalid, the revocation of the regulation was still unlawful. In this case the Acting Attorney General abolished the office of special prosecutor on October 23 and reinstated it less than three weeks later under a virtually identical regulation. "It is clear," said

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include a remand to the district court to vacate the previous judgement. On November 6, the court denied the motion to rehear en banc.

the court, "that this turnabout was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor." The revocation was therefore "arbitrary and unreasonable" and must be held to have been "without force or effect."

III. ROBERT BORK'S RESPONSES TO THE CHARGE OF ILLEGALITY AND TO JUDGE GESELL'S OPINION

Robert Bork has testified about the legality of his firing of Archibald Cox on at least four occasions: (1) On November 5, 1973, he testified before the House Judiciary Committee on bills then pending to create a statutory office of special prosecutor to replace Mr. Cox. This testimony was while the case before Judge Gesell was pending but prior to Judge Gesell's ruling. (2) On November 14, 1973, he testified before the Senate Judiciary Committee on the bills to create a statutory office of special prosecutor. This testimony came on the day that Judge Gesell ruled but before Bork had an opportunity to review the ruling. (3) On January 27, 1982, he testified before the Senate Judiciary Committee concerning his nomination to the Court of Appeals. (4) On September 15-19, 1987, he testified before the Senate Judiciary Committee concerning his nomination as Associate Justice of the Supreme Court. Judge Bork has also discussed his firing of the Special Prosecutor at a number of news conferences and interviews.

When asked about the lawfulness of the firing in these various appearances, Bork has given a number of different explanations. The most important reasons for arguing that the firing was lawful all involve broad assertions of Presidential power. The arguments that the firing was lawful are:

(1) The firing was ordered by the the President and the President is not bound by the regulation in the way that an agency head is. (1987, Senate Judiciary)

(2) The President can fire who he wants. (1973, Press Conference; 1973, Senate Judiciary)

(3) United States ex rel Accardi v. Shaughnessy, the Supreme Court case holding that agencies are bound by their own regulations, does not apply in this instance. (1973, House Judiciary)

(4) His firing of Cox was a "pro tanto" revocation of the regulation. (1973, House Judiciary)

(5) The firing has never been held to be illegal because the decision was vacated. (1987, Senate

Judiciary)

(6) The judge's decision was wrong. I wanted an appeal but was not able to get a ruling. (1987, Senate Judiciary)

The practical and policy explanations offered for not revoking the regulation are:

(7) "There was no staff around to do the necessary work" at the time of the firing. (1982, Senate Judiciary)

(8) The issue of whether the firing came before the revocation was "not ... important." (1982, Senate Judiciary)

(9) President Nixon was going to have his way. "There was never any question that Mr. Cox, one way or another, was going to be discharged." (1982, Senate Judiciary)

(10) There was no one else in the line of succession at the Department of Justice. (1982, Senate Judiciary)

(11) Attorney General Richardson and Deputy Attorney General Ruckelshaus recommended that I stay. (1982, Senate Judiciary)

(12) "We could not publish in the Federal Register until Tuesday." (1987, Senate Judiciary)

IV. WAS THE FIRING LAWFUL?

A. The Firing Violated A Department of Justice Regulation Having the Force of Law

On the night of October 20, 1973, when Robert Bork fired Archibald Cox, the regulation which Attorney General Richardson had negotiated with the Senate Judiciary Committee and with Cox and which he had published pursuant to his agreement with the Committee, was in full force and effect. One highly relevant provision stated that:

> The special prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court held that this very regulation, reissued with one additional clause when Leon Jaworski was appointed as the new special prosecutor, had the force of law:

> So long as this regulation is extant it has the force of law. In United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. Service v. Dulles, 354 U.S. 363, 388 (1957) and Vitarelli v. Seaton, 359 U.S. 535 (1959), reaffirmed the basic holding of Accardi.

Neither Robert Bork nor any other responsible official has ever claimed that Archibald Cox was guilty of "extraordinary improprieties." In fact both Elliot Richardson and Robert Bork have publicly stated that had they been in Cox's place, they would have acted as he acted. In the case before Judge Gesell, the Government specifically conceded that Cox had not been guilty of "extraordinary improprieties." In these circumstances it seems clear that Bork's firing of Archibald Cox was unlawful.

Even before the Supreme Court's decision in United States v. Nixon put the issue beyond doubt, three United States district courts, applying elementary principles of constitutional and administrative law, had found this regulation to have the force of law. Two of these courts had specifically found Bork's firing of Cox to be illegal.

The first district court decision, Judge Gesell's ruling in Nader v. Bork, has been discussed above. It was emphatic in holding that the firing was illegal.

The second case is United States v. Andreas, 374 F.Supp. 402 (D. Minn. 1974). In this case a defendant in a criminal case brought by Special Prosecutor Cox asked the federal district court to dismiss the information against him. The defendant's theory was that when Acting Attorney General Bork fired Cox and abolished the Office of Special Prosecutor, all court proceedings involving the Special Prosecutor abated and were terminated.

Calling Judge Gesell's opinion "well reasoned," U.S. District Judge Larson concurred in the conclusion that the firing of Cox and the abolition of the Special Prosecutor's office was invalid. On this basis the court ruled that the

information against the defendant was valid. This decision thus involves a direct holding that the firing of the Special Prosecutor was illegal. This decision was not affected by the order vacating Judge Gesell's judgment and remains in full effect.

The third federal district court to rule on the regulation establishing the Office of Special Prosecutor was United States v. Mitchell, 377 F. Supp. 1326 (D.D.C.1974), the trial court decision affirmed by the Supreme Court in United States v. Nixon. Like Judge Gesell and Judge Larson, Judge Sirica also found that the regulation had "the force of law." This ruling was critical to his determination that the courts had authority to adjudicate the dispute over executive privilege. The only authority cited by Judge Sirica for this key point was Judge Gesell's opinion in Nader v. Bork. As previously discussed, the Supreme Court specifically affirmed Judge Sirica's determination that the regulation had the force of law and that it was binding on the whole Executive Branch.

B. Bork's Claim that Nixon's Order to Fire Cox Overrode the Regulation is an Extreme View of Presidential Authority that Has Been Rejected by the Supreme Court.

At his 1987 Supreme Court confirmation hearings Robert Bork agreed that the ordinary rule is that an agency head is bound by the regulations of his own agency. Bork argued, however, that the ordinary rules do not apply to the situation in which a department head issues a regulation and the President gives an order to abolish the regulation or that is inconsistent with the regulation.

In his words:

> I thought, and still think, that those cases [that is, the cases holding that "an executive department may not discharge one of its own officers in a manner inconsistent with its own regulation"] do not apply to a case where a department head issues a regulation and the President orders him, the President gives an order to abolish that regulation, which is, in effect, what happened. September 16, p. 5.

> I think a Presidential order overrides an Attorney General's regulation. September 16, pp. 37-38.

> In this case, the President gave me an order to discharge Archibald Cox which I think overrides an

> Attorney General's regulation. That is why I think the action was legal. September 17, p. 88.
>
> In this case, the department head issued a regulation, and it was revoked by the President of the United States when he issued the order. There is no case involving that situation, so I do not think in any sense the very strong terms, the "broke the law" applies to that case. September 17, p. 94.

Resting on the premise that Presidential authority is unbridled, the theory asserted here by Bork is extreme. While Bork has not spelled this theory out in detail, his idea seems to be that if the President issues an order to a department head, that order has the effect of superseding any departmental regulation that is inconsistent with the order.

This theory is striking in its implications. By Bork's line of reasoning any departmental regulation could be rescinded by a Presidential order, notwithstanding the well settled law that a departmental regulation has the force of law.[3] In effect Robert Bork is arguing either that the properly issued regulations governing the duties and tenure of the Special Prosecutor lacked the force of law or that the President, and those acting at the direction of the President, do not have to obey the law.

One of many problems with this theory is that the Supreme Court has specifically rejected it. In United States v. Nixon, the Supreme Court addressed the question of whether the President is bound by a regulation issued by the Attorney General. It concluded that the Attorney General's regulation bound not just the Executive Branch but the courts and the Congress as well. It said:

> So long as the regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.

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[3] It is not clear how far Robert Bork would carry his theory. Since the established law is that regulations are law to the same degree as statutes, in principle he would seem to have to argue that the President can override statutes, such as the Administrative Procedures Act and the Federal Register Act, as well as regulations.

The conclusion that the regulation was binding upon both the President and the courts was the sole basis for the Court's determination that the courts were entitled--over the President's objection--to rule on the dispute about the Watergate tapes.

Chief Justice Burger's opinion for the Court demonstrates the weakness of Bork's argument. It indicates that revocation is a matter for the Attorney General, not the President:

> Here as in Accardi, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.

This language covers the situation involved in the firing of Archibald Cox exactly. While the Acting Attorney General might conceivably have ordered the regulation allowing discharge only for "extraordinary improprieties" revoked or amended before firing the Special Prosecutor, he did not do so,[4] The situation thus is exactly parallel to that in United States v. Nixon, where the Attorney General had not revoked or amended the regulation.

Similarly, just as President Nixon's stated desire to avoid having the courts rule on his claim of executive privilege did not effect a revocation of the regulation, so President Nixon's desire to have Mr. Cox discharged did not effect a revocation of the regulation.[5]

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[4] Whether such an attempted revocation would have had any legal effect is discussed in the next section.

[5] Even under Bork's own extreme theory that the President can revoke regulations, the firing would appear to be illegal because President Nixon never ordered the regulation revoked. His letter to Bork said: "I direct you to discharge Mr. Cox immediately ...." It did not say: "I direct you to revoke the regulation which says that Cox can be discharged only for 'extraordinary improprieties.'" Indeed there is nothing in the public record to indicate that President Nixon was ever advised that there was a regulation which had such a requirement or that the legality of the firing would be subject to challenge.

C. Bork's Claim That The Firing Was Just a Matter of "a 36 hour period" Ignores the "Unique Authority and Tenure" Granted by the Special Prosecutor Regulation.

In his 1982 testimony before the Senate Judiciary Committee Robert Bork did not argue the President had power to override regulations having the force of law. Rather he argued that the question of whether the firing was illegal was not "important," because it was at most "an argument about a 36 hour period."

He described the case before Judge Gesell as "a lawsuit about whether the [Special Prosecutor's] charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked." He went on to say:

> The reason the charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked.
>
> I do not think that the issue of which order it should have come in and whether the thing was illegal for 36 hours is important.[6]

Bork has advanced essentially the same argument at the 1987 hearings, characterizing his firing of Cox as at most a "technical defect." This argument essentially is that while it might have been unlawful to fire Cox on Saturday night without a determination that Cox had been guilty of "extraordinary improprieties," the firing clearly became lawful on the following Monday when Acting Attorney General Bork issued a new regulation revoking the one previously promulgated by Attorney General Richardson.

But was the illegality for only 36 hours? This argument ignores another part of the Department of Justice regulation promulgated by Attorney General Richardson. Governing the "Duration of Assignment" and specifying how the regulation could be terminated, this part of the regulation stated:

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[6] Bork went on to say: "I think the important issue is the one you go to, Senator, which is the moral issue." Hearings, p. 9. By "moral issue," Bork meant the promises made by Attorney General Richardson and Deputy Attorney General Ruckelshaus to the Senate Judiciary Committee "not to fire the Special Prosecutor." Bork stated: "I had made no such representations, and therefore I had a moral choice to make free of those problems they had."

> The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

Like all other parts of the regulation issued by Attorney General Richardson, this part was included in the regulation reissued upon the appointment of Leon Jaworski. Like the other parts, it was therefore a part of the regulation that the Supreme Court in United States v. Nixon held to have "the force of law." In so holding the Court was fully aware of the highly unusual features of the regulation, stating that it created a "unique authority and tenure" for the Special Prosecutor.[7] As the conditions required by the regulation for revocation were not satisfied, Bork's attempted revocation on October 21 was invalid. The illegality of his firing of Cox was therefore not just a 36-hour technicality but a serious and lasting breach of the law.

Judge Gesell in his earlier opinion in Nader v. Bork had relied on the same principle as United States v. Nixon. Recognizing that an agency normally has wide powers to amend or revoke its own regulations, he held that in this instance the Attorney General had voluntarily limited his power to revoke by promulgating a regulation empowering the Special Prosecutor to "continue to carry out his reponsibilities until he consents to the termination of the assignment." "This clause," Judge Gesell held, "can only be a bar to the total abolition of the Office of Watergate Special Prosecutor without the Special Prosecutor's consent." Judge Gesell went on to say that he saw no reason why such a clause was not valid.

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[7] The only difference between the original and the reissued regulation is the underlined language in the section on discharge: "In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

Judge Gesell also held that even if he could somehow find this particular clause invalid, the revocation of the regulation 36 hours later was still ineffective. It was "arbitrary and unreasonable," he said, for the Acting Attorney General to abolish the Office of the Special Prosecutor and then reinstate the office again in less than three weeks.

Similarly, Judge Larson did not find that the illegality was simply a 36 hour technicality. As part of his determination that the information in United States v. Andreas was valid, he ruled that the firing was wholly void.

D. The Vacating of Judge Gesell's Judgment on Grounds of Mootness Does Not Affect the Validity of His Reasoning.

In his 1987 testimony Robert Bork has argued for the first time that because Judge Gesell's judgment was vacated on the grounds of mootness, it has no effect. The argument fails to explain how the firing could be legal in the face of the Supreme Court's holding in United States v. Nixon that the regulation "had the force of law." Similarly, Bork's new argument fails to address Judge Larson's determination that the firing was illegal and Judge Sirica's determination that the regulation had the force of law.

The Supreme Court has frequently recognized that the vacating of a decision on grounds of mootness does not affect the force of the reasoning on which the decision was based. Thus, in the past decade every Justice has either written or joined an opinion citing a case which was vacated as moot.[8] In some instances opinions of this kind have been

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[8] A few of the many cases includes Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972) cited in Heckler v. Chaney, 105 S.Ct. 1649, 1665 n.7 (1985) and in Marshall v. Jerrico, Inc., 446 U.S. 238, 249 n.11 (1980); Slavin v. Curry, 574 F.2d 1256 (CA5), vacated as moot, 583 F.2d 779 (1978) cited in Pulliam v. Allen, 466 U.S. 522, 528 n.6 (1984); Davis v. Alabama, 596 F.2d 1214 (CA5 1979), vacated as moot, 446 U.S. 903 (1980) cited in United States v. Cronic, 466 U.S. 648, 660 n.26 (1984); Associated General Contractors v. Secretary of Commerce, 441 F.Supp. 955 (CD Cal.1977), vacated and remanded for consideration of mootness, 438 U.S. 909 (1978), on remand 459 F.Supp. 766 (CD Cal.), vacated and remanded sub nom. Armistead v. Assocated General Contractors, 448 U.S. 908 cited in Fullilove v. Klutznick, 448 U.S. 448, 455 n.6 (1980); Scarpa v. United States Board of Parole, 477 F.2d 278 (CA5)(en banc), vacated as moot, 414 U.S. 809 (1973) and Scott v. Kentucky Parole

the only authority cited.[9] It is not surprising therefore that other courts have continued to cite Judge Gesell's decision. The most recent citation was in August 1987 by Robert Bork's own court, the United States Court of Appeals for the District of Columbia.[10]

Bork's new mootness argument is particularly inappropriate because the event that rendered Judge Gesell's decision moot was the Supreme Court's decision in United States v. Nixon that the regulation ignored by Bork had "the force of law." In the original case Judge Gesell found that there was a controversy because the new Special Prosecutor might also be fired "if he pressed too hard for evidence." Once the Supreme Court had decided that the regulation overrode the President's attempt to keep the Executive Privilege issue out of the courts and had decided the Executive Privilege issue, there was no further controversy. Judge Gesell's decision was moot therefore because the Supreme Court in another case had already ruled against Bork's contention.

V. DID BORK PROPERLY EXERCISE HIS DUTIES AS ACTING ATTORNEY GENERAL WHEN HE COMPLIED WITH PRESIDENT NIXON'S DIRECTIVE TO FIRE COX?

A. Duty to Conduct Prosecutions and Investigations

As Acting Attorney General, Robert Bork was the chief prosecutor for the United States. He was directed by statute to "supervise all litigation" and given the authority to "investigate any violation of title 18 involving Government

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Board, No. 74-1899 (CA6 Jan. 15, 1975), vacated and remanded to consider mootness, 429 U.S. 60 (1976) cited in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 6 (1979); United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (CA2), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974) cited three times in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 26 n.6, 27, 39 n.20 (1979) (dissent); Brouk v. Managed Funds, Inc., 286 F.2d 901 (CA8 1961), vacated as moot, 369 U.S. 424 (1962) cited in Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979).

[9] See, e.g., Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C.Cir. 1970), vacated as moot, 401 U.S. 973 (1971) cited in Pacific Gas and Electric Co. v. Public Utilities Commission, 106 S.Ct. 903, 924 n.8 (1987).

[10] See Appendix B for citations.

officers and employees...notwithstanding any other provision of law...."[11]

At a minimum these duties required Acting Attorney General Bork to consider the effect that firing the Special Prosecutor would have on the Watergate investigation and prosecution.

While Bork has testified that there was never any possibility that the firing would have a negative effect on the investigation and prosecution, he has also testified that he was not informed about the current state of the investigation and that he had no assurances from the President about its future course.

In these circumstances it seems clear that Robert Bork failed to discharge his duty to obtain the information necessary to supervise the Watergate litigation.

B. Duty to Advise President Nixon

As Acting Attorney General, Robert Bork was also the chief legal officer for the Executive Branch. One of his earliest and most important duties, dating from the Judiciary Act of 1789, is to advise the President about legal matters.[12]

How well did Acting Attorney General Bork discharge these duties? One important guide to a lawyer's conduct is the American Bar Association's Model Code of Professional Responsibility. Under this code a lawyer is obligated "to represent his client zealously" but always "within the bounds of the law." [13]

Where the law is uncertain, how the lawyer should act may depend on "whether he is serving as advocate or adviser." While serving as an advocate (as when arguing in court), a lawyer should resolve his doubts "in favor of his client." When serving as an adviser, however, the lawyer generally "should give his professional opinion as to what the ultimate decisions of the courts would be as to the applicable law."[14]

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[11] 28 U.S.C. sections 519, 535 (1983).

[12] The current statute is 28 U.S.C. section 513.

[13] American Bar Association Model Code of Professional Responsibility Ethical Consideration 7-1 (1981).

[14] Model Code Ethical Consideration 7-3.

In firing Cox, Bork's role was not that of an advocate but rather that of adviser to President Nixon and an actor in his own right. Both these roles required that he act carefully to ensure legality. The Model Code spells out the duty of the lawyer adviser in some detail:

> A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.[15]

While the duties of the Attorney General are different from those of a private lawyer, at a minimum it seems clear that before he undertook the very serious step of firing the Watergate Special Prosecutor, Robert Bork had a duty to consider how the courts might rule on the firing and to satisfy himself that the firing was lawful.[16]

In making this determination he was entitled to take into account anything that he was told by Attorney General Richardson, Deputy Attorney General Ruckelshaus, or White House counsel.[17] Because the responsibility to give advice

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[15] Model Code Ethical Consideration 7-5.

[16] Any such consideration would have had to pay attention to the strong likelihood that a court would rule as Judge Gesell did. See K. Davis, 1 Administrative Law Treatise 300 (1958); Administrative Law Text 87 (1959). While it is true that former Attorney General Richardson testified in 1987 that he did not consider the regulation as binding, both Congresswoman Elizabeth Holtzman and Senator Charles Mathias raised the issue with Acting Attorney General Bork in Congressional hearings in 1973 before Judge Gesell had ruled.

[17] Former Attorney General Richardson has testified that prior to the firing he had obtained an opinion from the Office of Legal Counsel indicating that the President himself had the authority to fire the Special Prosecutor. Robert Bork has not mentioned this opinion in his testimony and former Attorney General Richardson did not indicate whether he had discussed the opinion either with Bork or with President Nixon. There is no indication as to whether the opinion discussed the departmental regulation. As the opinion apparently concerned President Nixon's own authority to fire Cox, it would not constitute authority for Bork's firing of Cox.

was his, however, he was not entitled to assume that someone else had properly advised President Nixon.

If, because he had not been involved in the dispute leading up to the firing, Robert Bork lacked the background information necessary to make a sound judgment about the legality of the firing, his duty was to obtain the requisite information and conduct any legal research necessary.[18]

If he believed that the firing was lawful under the broad theory of Presidential power that he relied on in his 1987 confirmation hearings, he should have known that this was an extreme theory that was subject to serious challenge. In such an event his duty was to advise President Nixon about the legal risks involved so that the President could make an informed decision.

It does not matter whether President Nixon requested or even wanted advice. As the Model Code states:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decisionmaking process if the client does not do so....A lawyer should advise his client of the possible effect of each legal alternative.[19]

If Acting Attorney General Bork believed that the firing was both lawful and not likely to be seriously challenged, arguably he was free of any duty to advise President Nixon about the legality of the firing. If this was his premise, however, Bork's legal conclusions were in serious error and raise major questions about his competence.

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[18] The duty to represent clients competently requires a lawyer "to act with competence and proper care." See Model Code Canon 6 and Ethical Consideration 6-1. A lawyer is specifically prohibited from handling "a legal matter without preparation adequate in the circumstances." Disciplinary Rule 6-101 (A)(2).

[19] Model Code Ethical Consideration 7-8. Although the 28 U.S.C. section 511 requires the Attorney General to give advice to the President only "when required by the President," it seems clear that the Attorney General's duty to advise is broader than this and that in taking action on a Presidential request an Attorney General represents to the President that the action taken is lawful.

There are no indications in the public record that Robert Bork or anyone else ever told President Nixon that the firing might be unlawful or that it would raise serious legal problems. Without such advice the chances that President Nixon would make the serious error that he did were greatly increased.

None of the non-legal explanations offered by Bork for the firing excuse either the illegality or the failure to advise the President properly. If Bork believed, as he testified in 1982, that staff assistance was necessary to revoke the regulation and make the firing lawful,[20] why did Bork not advise President Nixon of this problem? Even if President Nixon was determined to fire Cox, it would seem that he was entitled to be advised that if he fired Cox illegally that Cox or others might be able to sue for reinstatement or other relief.[21]

Nor can Bork rely on his discussions with Attorney General Richardson and Deputy Attorney General Ruckelshaus. Apparently both urged him to stay on at the Department of Justice in order to prevent further damage to the department from the whole affair. According to Bork's 1987 testimony, however, this advice came after both had advised him that he would have to decide for himself whether to fire Cox or not. This advice thus provided a strong reason for Bork to consider remaining at the Department of Justice if he decided it was proper to carry out the President's will. It clearly was not a reason, however, for either violating the law or failing to properly investigate the issue.

Another explanation that Bork has given is that President Nixon was going to have his way. "There was never any question," he testified in 1982, "that Mr. Cox, one way or another, was going to be discharged." The evidence available suggests that President Nixon clearly was determined to have his way.

It is not clear at all, however, why this is a reason for the Acting Attorney General to do an illegal act or to fail to discharge his duty to investigate the question of

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20 For the reasons previously discussed, mere revocation of the regulation would not have rendered the firing of Cox lawful.

21 Even on a Saturday night, it seems likely that the Acting Attorney General could find assistance if needed. Among others he might have called upon the Solicitor General's Office or upon one or more of the Assistant Attorneys General.

legality. The fact that they thought they were carrying out Presidential desires was not a defense for the Presidential advisors convicted of criminal offenses in the Watergate matter and is no better a defense for Bork.

No responsible private lawyer would take a major legal action for a client without investigating the legality of the action and explaining to the client the legal risks involved. A lawyer who took action without knowing what he was doing and without giving proper advice simply because his client insisted on immediate action would be regarded as a poor lawyer. The lawyer's job is not simply to do what his client wants but rather to advise the client as to what can lawfully be done.

Robert Bork was admittedly faced with a difficult situation. Plunging ahead on the basis of an extreme theory of Presidential power, however, without being careful to review either the facts or the law was neither lawyerlike nor responsible.

C. Duty to Ensure the Legality of His Own Actions

As the person who actually fired Cox, Acting Attorney General Bork was more than simply an advisor. He was an actor in his own right. As the person with statutory responsibility for all positions within the Department of Justice, he had a duty to be careful to ensure the legality of his own actions. For the reasons discussed in section B above, Robert Bork also failed to discharge this duty.

VI. CONCLUSIONS

Robert Bork's firing of Archibald Cox was one of the most significant events in his legal career. While Bork has put forward a number of extreme arguments in justification of his acts, four separate reasons indicate that the firing was unquestionably unlawful:

--The Supreme Court held in United States v. Nixon that the regulation allowing the Special Prosecutor to be discharged only for "extraordinary improprieties" had "the force of law."

--Two federal district courts have found that Bork's firing of Cox was unlawful.

--The Senate Judiciary Committee was promised that this regulation would be a "matter of law."

--The rule that agencies must follow their own procedural rules is an elementary principle of

constitutional and administrative law that has long been well established.

Because the regulation issued by Attorney General Richardson also provided that it was not to be terminated until the Special Prosecutor agreed to termination, the same four reasons indicate that the illegality was not simply a 36-hour technicality but a serious and lasting breach of law.

As the Acting Attorney General, Robert Bork had three duties to perform before taking the serious step of firing Special Prosecutor Cox:

--As the nation's top prosecutor, he had a duty to be certain that the firing would not interfere with the Watergate investigation and prosecution.

--As the chief legal officer for the Executive Branch, he had a duty to advise President Nixon about the important legal issues involved.

--As the person who would do the firing, he had a duty to ensure that his own acts in effecting the firing were lawful.

Each of these duties required that Robert Bork make some investigation of the facts and the law related to the firing and the underlying situation. His failure to do so led to the illegality and ill served both President Nixon and the nation.

The two principal arguments that Robert Bork has put forward on the question of legality are that:

--President Nixon's order to fire Cox overrode the regulation.

--Any illegality involved was just a technicality and "not...important."

The first argument, that President Nixon had authority to override a duly promulgated regulation having "the force of law," is an extreme assertion of Presidential power that has been explicitly rejected by the Supreme Court. The second argument trivializes a regulation that had been developed through extensive negotiation with both the Special Prosecutor and the Senate Judiciary Committee.

Robert Bork is not the first Attorney General to use the law to satisfy a President.[22] In deferring to the President on an important issue, however, few Attorney Generals have put forward such thin legal arguments or treated the issue of legality as so unimportant.

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[22] Miller, "The President's Lawyer," in L. Huston, A. Miller, S. Krislov and R. Dixon, Roles of the Attorney General of the United States (1968).

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Appendix A

Duties and Responsibilities of the Special Prosecutor

Following are guidelines relating to the special Watergate prosecutor issued by Attorney General-designate Elliot L. Richardson May 19.

THE SPECIAL PROSECUTOR

There will be appointed by the attorney general, within the Department of Justice, a special prosecutor to whom the attorney general shall delegate the authorities and provide the staff and other resources described below.

The special prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate, all offenses arising out of the 1972 presidential election for which the special prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or presidential appointees, and any other matters which he consents to have assigned to him by the attorney general.

In particular, the special prosecutor shall have full authority with respect to the above matters for:

- Conducting proceedings before grand juries and any other investigations he deems necessary.
- Reviewing all documentary evidence available from any source, as to which he shall have full access.
- Determining whether or not to contest the assertion of "executive privilege" or any other testimonial privilege.
- Determining whether or not application should be made to any federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders.
- Deciding whether or not to prosecute any individual, firm, corporation or group of individuals.
- Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals.
- Coordinating and directing the activities of all Department of Justice personnel, including United States attorneys.
- Dealing with and appearing before congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the special prosecutor will have the greatest degree of independence that is consistent with the attorney general's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The attorney general will not countermand or interfere with the special prosecutor's decisions or actions. The special prosecutor will determine whether and to what extent he will inform or consult with the attorney general about the conduct of his duties and responsibilities. The special prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

STAFF AND RESOURCE SUPPORT

Selection of Staff. The special prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the assistant attorneys general and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States attorneys, shall cooperate to the fullest extent possible with the special prosecutor.

Budget. The special prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

Designation and Responsibility. The personnel acting as the staff and assistants of the special prosecutor shall be known as the Watergate special prosecution force and shall be responsible only to the special prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division. Except for the specific investigative and prosecutorial duties assigned to the special prosecutor, the assistant attorney general in charge of the criminal division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies. Except as otherwise herein specified or as mutually agreed between the special prosecutor and the attorney general, the Watergate special prosecution force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports. The special prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment. The special prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as in his judgment, he has completed them or until a date mutually agreed upon between the attorney general and himself.

Appendix B

Cases Citing Nader v. Bork

1. Oil Shale Corporation v. Morton, 370 F.Supp. 108 (D. Colo. 1973).

Action to declare Department of Interior decisions regarding oil shale mining claims erroneous.

Nader v. Bork cited as support for proposition that "the authority to change Departmental regulations and policies does not relieve a Department head from the obligation of following such regulations and policies until they are officially and publicly changed." P. 124.

2. United States v. Mitchell, 377 F. Supp. 1326 (D.D.C. 1974).

President Nixon moved to quash a subpoena issued by Watergate Special Prosecutor Jaworski for tape recordings and writings need for the trial of John Mitchell.

Nader v. Bork cited for proposition that "The current Special Prosecutor is vested with the powers and authority conferred upon his predecessor pursuant to regulations which have the force of law." P. 1329.

3. United States v. Cowan, 396 F. Supp. 803 (N.D. Tex. 1974).

U.S. attorney seeks to dismiss indictment. Court refuses and U.S. attorney declines to prosecute. Court holds hearing.

Nader v. Bork cited as support for proposition that "the basic constitutional objection to the appointment of special prosecutors is that the power to prosecute is vested exclusively in the executive branch by Article II of the U.S. Constitution which empowers the President to take care that the laws be faithfully executed." P. 804.

4. United States v. Andreas, 374 F. Supp. 402 (D. Minn. 1974).

Criminal defendant claims that the information filed against him by Watergate Special Prosecutor Cox is invalid because Mr. Cox was fired and the Special Prosecutor's Office abolished.

Nader v. Bork cited as authority for holding that the firing of Cox the abolition of the special prosecutor was illegal. P. 410.

5. Hootch v. Alaska State-Operated School System, 536 P.2d 806 (Alaska 1975).

Suit by native Alaskan high school students to compel state to locate high schools in their rural communities.

Nader v. Bork cited for proposition that "An administrative agency may modify or repeal its regulations so long as such action is neither arbitrary nor unreasonable." P. 806 n.52.

6. Wilt v. Beal, 363 A.2d 876 (Penn. 1976).

Action by a member of Pennsylvania House of Representatives to enjoin the Secretary of Public Welfare and the State Treasuer from taking steps to use and operate the recently completed Altoona Geriatic Center as a mental health facility.

Nader v. Bork is cited twice: once as an example of an instance in which legislators were given standing to sue and second for the proposition that "certain additional duties are placed upon members of the legislative branch which find no counterpart in the duties placed upon the citizens the legislators represent." P. 881.

7. Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967 (7th Cir. 1977).

Action under Freedom of Information Act to compel disclosure of memorandum written by staff to Mr. Jaworski justifying the decision not to prosecute former President Nixon after President Nixon had resigned and been pardoned.

Nader v. Bork is cited in a footnote discussing the regulation setting forth the duties of the Special Prosecutor. The footnote stated: "The dismissal of Cox was subsequently held to be illegal in Nader v. Bork, 366 F. Supp. 104 (D.D.C.1973)." P. 970, n.3.

8. Viles v. Claytor, 481 F. Supp. 465 (D.D.C.1979).

Suit by a commander in the U.S. Naval Dental Corps claiming that he was wrongfully denied a promotion to captain because the review board was not constituted as required by regulation.

Nader v. Bork cited for proposition that "the power to revoke or change an administrative agency regulation is not unlimited." P. 469 n.12.

9. United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (1979).

Alaska telephone company seeks review of state public utilities commission decision denying interim rate increase.

Nader v. Bork cited as support for rule that "in general an administrative agency must comply with its own regulations." P. 498 n.20.

10. Borders v. Reagan, 518 F. Supp. 250 (D.D.C. 1981).

Member of District of Columbia Judicial Nomination Commission who had been appointed by previous President sues for injunction and declaratory relief to prevent his removal by President Reagan.

In striking down the attempt to remove, the court says it finds Nader v. Bork distinguishable from cases in which discharges have been filed. P. 264.

11. Banzhaf v. Smith, 588 F.Supp. 1489 (D.D.C. 1984).

Action brought under Ethics in Government Act to require the Attorney General to appoint an Independent Counsel to investigate whether criminal offenses were committed by high level officials in course of alleged transmittal of certain briefing materials from the White House to headquarters of presidential candidate.

Nader v. Bork cited for proposition that "the Attorney General may, on his own, appoint a special prosecutor whether or not he is required to do so by a court." P.1510.

12. In re Sealed Case (No. 87-5247) (D.C.Cir., August 20, 1987).

Appeal by Oliver North from order holding him in contempt for refusing to comply with a grand jury subpoena. North claims that the Independent Counsel lacked authority to conduct the grand jury proceeding under either the Ethics Act or under an appointment by the Attorney General.

The court ruled that the appointment by the Attorney General was valid. The court said that the Independent Counsel was not an officer of the United States requiring Senate confirmation but rather an "inferior" officer. One indicia of this is that the Independent Counsel may be abolished at any time by the Attorney General.

Nader v. Bork is cited as follows:

> n.33 In Nader v. Bork, 366 F.Supp. 104, 108-09 (D.D.C.1973), the district court found arbitrary and capricious the October 23, 1973, rescission of the regulation creating the Office of Watergate

Special Prosecutor, inferring from its repromulgation three weeks later that it was rescinded only to permit a result--the firing of Archibald Cox--that "could not legally have been accomplished while the regulation was in effect under the circumstances presented." Id. at 109. Cf. Vitarelli v. Seaton, 359 U.S. 535, 545-46 (1959). We are not presented with similar facts here and thus need not decide whether that analysis was correct. Nor does the Attorney General's March 5, 1987, regulation require, as a condition of its rescission, the consent of the Independent Counsel: Iran/Contra. Accordingly, we need not decide either whether the district court in Nader v. Bork properly relied upon the alternative ground that the rescission was invalid because Cox had not consented to it, as the regulation purported to require. 366 F. Supp. 108.

Appendix C

Robert Bork's Firing of Archibald Cox: A Chronology

June 17, 1972	Burglars break into Democratic National Headquarters at the Watergate.
November 7, 1972	President Nixon reelected.
January 4, 1973	President Nixon nominates Robert Bork toserve as Solicitor General.
January 8, 1973	Trial of Watergate burglars begins before Judge Sirica.
January 17, 1973	Confirmation hearing for Robert Bork as Solicitor General. Appointment not to take effect until departure of Erwin Griswold in mid-summer.
January 30, 1973	Trial of Watergate burglars ends.
February 1, 1973	Senate confirms Bork appointment.
February 7, 1973	Senate unanimously votes to create Select Watergate Committee.
March 23, 1973	Judge Sirica sentences Watergate burglars, reads McCord letter alleging that others are involved.
April 30, 1973	President Nixon announces resignation of Richard Kleindienst as Attorney General and the resignations of H.R. Haldeman, John Ehrlichman, and John Dean as key White House aides.
April 30, 1973	President Nixon announces appointment of Elliot Richardson as Attorney General. States that Richardson will be in "full charge" of the Watergate investigation and will have authority to appoint a Special Prosecutor.
May 7, 1973	Richardson announces that he will appoint a special prosecutor.
May 9, 1973	Senate begins confirmation hearings on Richardson nomination. Virtually all testimony concerns appointment of special prosecutor. Richardson indicates that he will seek the Committee's

	endorsement of his choice as special prosecutor.
May 17, 1973	Senate Watergate Committee (Ervin Committee) begins public hearings.
May 18, 1973	Richardson appoints Archibald Cox as Special Prosecutor.
May 21, 1973	Richardson and Cox appear before Senate Judiciary Committee. Richardson publicly issues guidelines for the Watergate Special Prosecutor. These state that: "The special prosecutor will not be removed from his duties except for extraordinary improprieties on his part." Committee endorses the selection of Cox.
May 23, 1973	Richardson confirmed by Senate.
May 25, 1973	Cox assumes duties.
June 4, 1973	Richardson publishes regulation.
June 19, 1973	Robert Bork commissioned as Solicitor General (upon departure of Erwin Griswold).
June 26, 1973	Robert Bork sworn into office.
July 16, 1973	Existence of White House taping system revealed to Ervin Committee by Alexander Butterfield.
July 18, 1973	Cox writes letter to White House requesting tapes.
July 23, 1973	At Cox's request Judge Sirica issues show cause order on the tapes. Ervin Committee also subpoenas the tapes.
July 23, 1973	President Nixon nominates William Ruckelshaus to serve as Deputy Attorney General.
July 26, 1973	White House notifies Judge Sirica and Ervin Committee that it will not deliver tapes because of executive privilege.
August 2, 1973	Senate Judiciary Committee begins hearings on confirmation of William Ruckelshaus as Deputy Attorney General.

August 21, 1973	Bork consulted by Richardson concerning jurisdiction of special prosecutor. Writes memo.
August 29, 1973	Judge Sirica orders Nixon to turn over the tapes.
September 10, 1973	Nixon appeals Judge Sirica's order to turn over the tapes.
September 13, 1973	Senate confirms Ruckelshaus as Deputy Attorney General.
October 12, 1973	D.C. Court of Appeals upholds Sirica order requiring Nixon to turn over the tapes.
October 15, 1973	White House formulates compromise under which summaries of the tapes, verified by Senator Stennis, would be turned over to the court instead of the tapes themselves.
October 15-16, 1973	Richardson verbally discusses compromise with Cox.
October 17, 1973	Richardson gives Cox written outline of compromise.
October 18, 1973	Cox outlines some problems.
October 19, 1973	White House breaks off discussions with Cox. Nixon announces to nationally televised news conference that he will not appeal Court of Appeals order and that he will submit verified summaries, rather than the actual tapes, to Judge Sirica. Nixon directs Richardson to order Cox not to seek further tapes, notes or memoranda of Presidential conversations.
October 20, 1973 (Saturday)	Richardson refuses to order Cox not to seek further tapes notes or memoranda of Presidential conversations. Cox tells press that he will ask Judge Sirica to require the actual tapes to be produced. Nixon directs Richardson to fire Cox. Richardson refuses and resigns.

Nixon orders Ruckelshaus to fire Cox. Ruckelshaus refuses and resigns.

Nixon orders Bork, now the Acting Attorney General, to fire Cox. Bork agrees and signs letter drafted by White House legal consultant Charles Alan Wright.

Ziegler announces that Nixon has fired Cox. that Richardson has resigned, that Ruckelshaus has been fired. Also announces that the office of special prosecutor has been abolished and that the FBI has been instructed to seal off the offices of Richardson, Ruckelshaus and the special prosecutor.

FBI seals offices of the Watergate Special Prosecutor. Great confusion about status of the staff.

October 22, 1973 (Monday)

Bork meets with Henry Ruth and Phillip Lacovara, the two principal Cox deputies and with Henry Peterson, the assistant attorney general in charge of the criminal division. Bork later testifies that he gave assurances that the special prosecution would continue and that the tapes will be pursued. This testimony is disputed.

Bork formally abolishes Office of the Special Prosecutor, transfers staff to criminal division.

House leadership tentatively approves an inquiry investigating impeachment of President Nixon.

October 23, 1973

Bork order abolishing Office of Special Prosecutor published in Federal Register. Bork establishes more detailed chain of succession in Department of Justice.

Representative Culver introduces bill to create a court-appointed special prosecutor. Bill ultimately has 111 co-sponsors. Other bills also introduced. Telegrams pour into Washington at record rate.

October 24, 1973 — Senate Republican leaders urge Nixon to appoint a new special prosecutor.

House Judiciary Committee Chairman Rodino announces that Committee will proceed "full steam ahead" with investigation of grounds for impeachment.

October 25, 1973 — Assistant Attorney General Petersen and special prosecutor's staff ask Judge Sirica to take protective custody of special prosecutor's files.

House Republican Conference members urge Nixon to appoint new special prosecutor.

October 26, 1973 — Nixon announces that Bork will appoint a new special prosecutor. Says new special prosecutor will have "total cooperation" but will not be given White House documents involving Presidential conversations.

Senator Bayh, with 52 co-sponsors, introduces bill for court-appointed special prosecutor.

October 28, 1973 — White House Chief of Staff Haig announces at a news conference that the new special prosecutor will not have to pledge not to seek White House documents.

October 29, 1973 — Senate and House Judiciary Committees begin hearings on the need for a statute creating the special prosecutor.

November 1, 1973 — Nixon nominates Senator William Saxbe as new Attorney General. Bork appoints Leon Jaworski as the new Special Prosecutor. Bork says that Jawaorski will have "full cooperation" and that if Jaworski decided that he needed presidential documents there would be no restrictions on his freedom to seek them.

November 2, 1973 — Bork reissues regulations creating office of special prosecutor. Wording identical to previously revoked regulation except for addition of assurance to consult eight congressional

	leaders before taking action that might affect independence or tenure.
November 5, 1973	Jaworski sworn into office.
November 5, 1973	Bork testifies before House Judiciary Committee arguing that the present arrangements are satisfactory and that no statute is needed.
November 14, 1973	Judge Gesell issues ruling declaring that Bork's firing of Cox was illegal.
November 14, 1973	Bork testifies before Senate Judiciary Committee arguing against a statute creating an independent special prosecutor.
December 7, 1973	Senator Proxmire begins suit to have Bork's interim appointment declared to be illegal for going too long.
December 17, 1973	Saxbe confirmed as Attorney General.
January 4, 1974	Saxbe sworn into office.
February 6, 1974	House votes to investigate "whether sufficient grounds exist" for impeachment.
February 14, 1974	Department of Justice appeals Judge Gesell's decision.
July 24, 1974	Supreme Court decision in United States v. Nixon.
August 8, 1974	President Nixon resigns.
	Plaintiffs move to dismiss appeal in Nader v. Bork.
August 29, 1974	Department of Justice moves for summary reversal in Nader v. Bork.
January 22, 1975	Department of Justice motion denied.
August 20, 1975	Appeal in Nader v. Bork dismissed as moot.
October 1, 1975	Deparment of Justice moves for a rehearing en banc in Nader v. Bork.
October 22, 1975	Order dismissing appeal in Nader v. Bork

	amended to return case to district court to be vacated.
November 6, 1975	Rehearing en banc in Nader v. Bork denied.
January 20, 1977	Bork resigns as Solicitor General.
December 7, 1981	President Reagan nominates Bork to serve on the U.S. Court of Appeals for the District of Columbia Circuit.
January 27, 1982	Senate Judiciary Committee holds hearings on Bork's nomination.
February 8, 1982	Senate confirms Bork nomination.
February 12, 1982	Bork assumes permanent appointment.
July 1, 1987	President Reagan nominates Bork to serve as Associate Justice on the Supreme Court.

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September 22, 1987

EXPRESS MAIL

The Honorable Joseph R. Biden
Senate Judiciary Committee
The United States Senate
Washington, D.C. 20510

Dear Senator Biden and the Honorable Members of the Senate Judiciary Committee:

On September 21, 1987, at the California State Bar Conference of Delegates, a press conference was called by past and present leaders of the State Bar and its affiliates to declare their opposition to Judge Robert Bork's appointment to the United States Supreme Court and to request the Senate to deny confirmation of the President's nominee. Bar leaders calling and participating in the Press Conference include:

Anthony Murray, Past President of the State Bar of California
Patricia Phillips, Past President of the Los Angeles County Bar Association
James Brosnahan, Past President of the Bar Association of San Francisco
Edward Kallgren, President Elect of the Bar Association of San Francisco
Charles Dickerson, Vice President of the John M. Langston Bar Association
Jeffrey Gordon, O'Donnel & Gordon
Jerome Falk, Past President of the Bar Association of San Francisco
Jack Stutman, Past President of the Los Angeles County Bar Association
Judy Hamilton, Vice President of the Lawyers Club of San Diego
Lorraine Loder, President Elect of Women Lawyers of Los Angeles

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Curtis Namba, President of the Asian Bar Association of Sacramento
John McTernan, National Lawyers Guild
Howard L. Watkins, President of the Fresno County Bar Association
Judy McElvey, Past President of the Bar Association of San Francisco
Joanne Garvey, Past President of the Bar Association of San Francisco
Jim Andrews, President of the Beverly Hills Bar Association
Richard Kamins, Past President of the Beverly Hills Bar Association
Bert Tigerman, Past President of the Beverly Hills Bar Association
Adrienne J. Miller, President of Queens Bench Bar Association
Renard Shepard, President of the Wiley W. Manual Bar Association of Sacramento
Robert Switzer, Board Member of California Lawyers for Individual Freedom

These individuals represent some of the many Bar Associations in California who are opposed to Judge Bork's appointment, which include:

Bar Association of San Francisco
Beverly Hills Bar Association
Lawyers Club of San Diego
California Women Lawyers
National Lawyers Guild
National Bar Association
Asian Pacific Bar Association of California
John Langston Bar Association
Barristers of the Bar Association of San Francisco
Women Lawyers of Los Angeles
Wiley W. Manual Bar Association of Sacramento County
Monterrey County Women Lawyers Association
Queens Bench Bar Association
Southern California Chinese Lawyers Association
Asian Bar Association of Sacramento
Asian American Bar Association of the Greater Bay Area
Philippino Lawyers Association of Southern California

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Asian Law Caucus
La Raza Legal Alliance
National Conference of Black Lawyers
Southern California Asian Pacific American Legal Center
Korean American Bar Association of the Greater Los Angeles Area
California Attorneys for Criminal Justice
California Lawyers for Individual Freedom
Los Angeles Lawyers for Human Rights

These Bar Associations are joined in their request that the Senate reject Judge Bork's confirmation by the hundreds of California lawyers who signed the enclosed petition while present at the State Bar Conference held this weekend.

We urge you to recognize the voice of the lawyers of California when we say that it is our firm belief that Robert Bork must not be appointed to the Supreme Court. His appointment puts in jeopardy the Constitution which we are all pledged to defend and which we hold so dear. Robert Bork's decisions, speeches and writings clearly reflect that he is far outside the mainstream of legal reasoning and that he has no respect for individual liberties guaranteed by our Consitution. In this Bicentennial year of the Constitution we must reaffirm the basic tenets of liberty and freedom on which America was built and reject Judge Bork's nomination to the Supreme Court.

Sincerely,

Margo A. Feinberg

MAF:cac
Enclosures

cc: Senator Alan Cranston (w/ enclosures)
Senator Pete Wilson (w/ enclosures)

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THE NOMINATION OF JUDGE BORK TO THE UNITED STATES SUPREME COURT AND THE ADVISE AND CONSENT FUNCTION OF THE UNITED STATES SENATE

JOHN J. FLYNN
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Mr Chairman and Members of the Committee:

My name is John J. Flynn. I am the Hugh B. Brown Professor of Law at the University of Utah College of Law, Salt Lake City, Utah. For over twenty-five years I have taught, written about and practiced antitrust law. I also teach and write in the fields of Regulated Industries and Jurisprudence or Legal Philosophy. In addition to extensive writing in these fields, including casebooks in the fields of antitrust and regulated industries, I have also served as Special Counsel to the Senate Antitrust Subcommittee when it was chaired by the late Senator Philip Hart of Michigan, I have participated as a lawyer in well over 100 significant antitrust and regulated industry cases, delivered countless speeches on these topics, served as a final arbitrator in complex antitrust and regulatory litigation and been a member of numerous drafting committees and advisor to state and federal legislators on the topics of antitrust and regulated industries.

I have also had a long term interest in the question of the role of the Senate in the judicial nominating process. It stems from activities in the service of Senator Hart when he served on the Judiciary Committee; a close following of the Fortas-Carswell-Haynesworth nominations in the late sixties and my own candidacy for appointment to the Tenth Circuit Court of Appeals as the result of the Carter nominating commission process in the 1970's. I have always had an abiding concern for the nominating processes for judges, particularly for the Senate's role in that process. I have seen that process go through stages one might characterize as the "patronage stage" where Senators deferred (unduly in my judgment) to the interests of the Senator from the candidate's state; the "Commission stage" where independent commissions proposed a slate of candidates and politics entered the process of selecting the nominee once the slate was named, thereby undermining the independent commission's ability to attract good candidates without political clout in the first instance; and the "ideology stage", where the Executive Branch has sought to load the federal courts with judges holding a particular social, political and economic ideology and claim that the Senate has no role in examining the candidate's suitability for the federal bench other than their ethical and moral qualifications. In each stage, I have thought that the Senate has failed to exercise its co-equal role in the judicial nominating process, by failing to make its own evaluation of the candidate's suitability for appointment. It has done so by failing to examine closely the candidate's skill and competence with legal reasoning, ideological suitability, and capacity for open-minded self-reflection. It is on each of these grounds that I have serious questions concerning the nomination of Robert Bork for the position of Associate Justice of the United States Supreme Court.

Having said this, I must also emphasize the considerable risk that a free-wheeling and politically motivated evaluation of judicial candidates by either the Executive or legislative branch can unduly politicize the judiciary and do great damage to the only source of its power -- the trust and confidence of the general public that our judiciary is above politics and comprised of the most wise, reflective and open-minded persons we can find to interpret our laws and preserve the values underlying the Constitution and the laws our representatives in Congress adopt. Our judges are the trustees of our values, because every legal decision is a moral decision -- a question of ought. [1] Thus, this Committee and the witnesses before it must walk a fine line between a thoughtful and reflective examination of the qualifications and suitability of a candidate to serve in the weighty role of judge and the temptation to turn that evaluation into a basis for gaining some political advantage or to play to the passions of the moment. We are all injured if damage is done to the public's trust in the institution of the judiciary by nominating or confirming persons unqualified for the role or by denying confirmation to those well qualified to serve for reasons having little or nothing to do with their qualifications for the office. Undermining public trust in the fairness and competence of our judiciary does great damage to that institution, because the root of the judiciary's power and authority is the public's trust in the fairness, integrity and honesty of the judges serving on those courts.

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[1] . F. Cohen, Ethical Systems and Legal Ideals 3 - 7 (1959); Cohen, The Ethical Basis of Legal Criticism, 41 Yale L.J. 201 (1931); Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). In describing the analytical positivism of the late nineteenth century, Pound described a state of affairs equally applicable to the current excessive reliance upon neo-classical economic theorizing to decide antitrust cases:

> In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law -- that is, on grounds and by a process prescribed in or provided by law. One must admit that the strict theory of the last century denied the first proposition, conceiving the judicial function to begin and end in applying to an ascertained set a facts a rigidly defined legal formula definitively prescribed as such or exactly deduced from authoritatively prescribed premises.

Pound, The Theory of Judicial Decision, 36 Harv. L.Rev. 940 (1936).

See also, Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975); Michmelman, Norms and Normativity in the Economic Theory of Law, 62 Minn. L. Rev. 1015 (1978).

Much has been made of "ideology" as a touchstone for the Senate to evaluate the candidacy of Judge Bork. I think it is relevant, but only in a special and relatively narrow sense. We all walk through life with an ideology -- a set of basic moral or "ought" convictions determining the way we view reality and defining the standards by which we judge the reality perceived. That is what causes some of us to favor one sports team over another, believe in one religion or another or profess allegiance to one political party or another. If a person has no ideology whatsoever, they would be a prime candidate for study by all manner of disciplines. One cannot go through life without a set of convictions and function as a rational and thinking human being. Those convictions are the product of education, the use of language, public and personal definitions of the roles we occupy and all of our life experiences. They dictate the way we view reality and the way in which we balance the underlying values or moral beliefs unavoidably wrapped up in any set of convictions and the disputes we are called upon to evaluate. It is in part why we have a system of checks and balances, judicial review and appellate courts made up of more than one judge. It is also why most of us have a concern with one party rule, rigid ideologues on the bench and extremists who claim that only they have the "truth" in any role in public life.

So the issue for the Senate is not whether a judicial nominee has an ideology or set of convictions. We need appellate judges of different ideological beliefs and it would be inappropriate for a President or the Senate to insist that all judges meet a uniform ideological litmus test. Such an approach to judicial selection would not only unduly politicize the judiciary, but it would also deprive the judiciary of the clash of contending ways of understanding the issues brought before it and deprive judges of a primary source of compulsion to reexamine their own moral convictions. We would end up with a judiciary like a one party legislature. In this regard, I think the President has applied an ideological litmus test for many of his judicial appointments and failed to seek that diversity of viewpoint essential to a healthy and well functioning judicial system capable of fairly and open-mindedly searching for legislative intent and the underlying moral meaning of the basic provisions of the Constitution through the clash of different perspectives on the court. And, it is appropriate for the Senate to check such a course of conduct by the Executive Branch in the interests of maintaining and strengthening the quality of the judiciary.

Ideology is an important consideration for the Senate in weighing the qualifications of judicial nominees in two additional ways. One is whether the candidate holds ideological views so far removed from the common mainstream of understanding of the meaning of our basic laws and methods of legal reasoning as to be

completely at odds with the basic moral consensus of our society. If for example, the candidate were a member of the Nazi Party or a doctrinaire Marxist, it would be quite appropriate for the Senate to take that into consideration and judge a candidate unqualified for the important task of applying our common moral beliefs through the judicial process. By the same token, if the candidate is a rigid legal positivist -- one who believes that all that judging involves is to apply rigid definitions to predetermined facts -- the Senate should reject the candidate whatever their ideology as unqualified to carry out the most basic function of judging. For it is essential to that task to recognize that every legal decision is a moral decision -- an "ought" question. It is inherent in legal reasoning. This is so because the words we use to express our laws are symbols -- they provide a guide for understanding the underlying values and moral objectives the law giver had in mind when adopting the law. Yet, the connotations wrapped up in those symbols must also be applied to the specific facts in controversy by determining whether the connotation of the words denotes the issue and facts in the controversy before the court.

It is here that the ideology and skill with legal reasoning of a judge become of overriding importance, for that ideology and skill will deeply effect the reasoning process of the judge. The judge must first determine what rules and what facts are relevant to the analysis; the judge must then determine what the rules and the facts mean in light of the moral values underlying the rules and the limitations upon the institution of judicial review; and, the judge must then determine how the rules found relevant apply to the facts found relevant. The analysis is a functional one, not a process of applying predetermined definitions to predetermined facts served up for analysis (rules x facts = decision) like the resolution of some problem in geometry with its closed system of assumptions and narrow definition of what the "facts" can be. [2] What has been troubling many lawyers and some members

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[2] Little attention is paid today to a profound lesson the legal realists gave us -- the significance of the difficult process by which it is determined what "facts" are relevant to a dispute, what those "facts" mean and how those "facts" operate in the application of the rules to the dispute. Legal realists were fact skeptics as well as rule skeptics, noting the close interrelationship between determining the relevance, meaning and application of the rules to the determination of the relevance, meaning and application of the facts. See, J. Frank, Courts On Trial 316 - 25 (1950); Cook, "Facts and "Statements of Fact", 4 U. Chi.L.Rev. 233 (1936); Cohen, Field Theory and Judicial Logic, 59 Yale L.J. 238 (1950); Oliphant, Facts, Opinions, and Value-Judgments, 10 Texas L.Rev. 127 (1932). Cf., Leff, Some Realism About Nominalism, 60 Va. L.Rev. 451 (1974).

The significance and difficulty of determining what the

of this Committee about Judge Bork, is that he is a follower of the discredited rules x facts = decision model of reasoning -- a methodology at odds with modern understandings of the nature and requirements of legal reasoning.

The process of legal reasoning may seem to be a paradox of having to know what rules are relevant, what they mean and how they apply in order to know what facts are relevant, what they mean and how they apply. The way judges break into the analytical circle is by understanding the moral objectives of the law. And the way in which a judge understands the moral objectives of the law is by virtue of the ideology they bring to bear in understanding the language of the law and the reality they are asked to judge. If that ideology is beyond the bounds of our common understanding and beliefs, for example a belief that all non-whites and non-males are inferior, you will have a judge who views reality and the meaning of the rules quite differently from a judge who believes in a basic equality of all persons without regard to race or gender. And if you have a judge who is closed minded about his or her beliefs or -- even worse -- unaware that he or she holds a set of ideological beliefs coloring their view of the meaning and relevance of the rules and the facts, you will

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"facts" are and the interrelationship of that process to the determination of what the "rules" are has even been noted by some modern economists. See, W. Leontiff,Why Economics Needs Input-Output Analysis (Interview), Challenge, March-April (1985) at 27:

> [E]conomics is getting too far removed from observation. Observation must be the origin of the idea. Then there must be an interplay between observation and theory.
>
> . . . .
>
> Academic economists in our day have generally not been subject to the harsh discipline of systematic fact finding.

See also, A. Kamarck, Economics and the Real World 6 (1983):

> "Econometric models that assume accuracy and precision beyond the margins set by reality have no practical usefulness (other than as games, teaching aids or as kinds of finger exercises)and bear the same relationship to economics and economic policy as scientific fiction has to science -- that is, they may require a good deal of imagination and pseudo-scientific calculation but are of no help in coping with the real world."

Scientific reasoning, when carried out at its highest and most constructive level must also deal with the difficult process of determining what the facts are, what they mean and how they work in the circumstances under investigation in light of the theories found relevant, and vice-versa. See, T. Kuhn, The Structure of Scientific Revolutions (2nd Ed. 1970).

have a judge incapable of legal reasoning. In a word, you will have an ideologue beyond rational argument and debate; a person incapable of re-examining their own beliefs in understanding and applying our collective beliefs expressed through law to an ever changing and evolving reality. [3] Such a judge may mouth the words of "judicial restraint" and "original intent", but it will be the "judicial restraint" and "original intent" dictated by their own rose colored ideological glasses. The worst possible case is not the judge who does so dishonestly. Such a judge is at least aware of what he or she is doing and like all sinners, may be persuaded to repent. The worst possible case is a judge unaware that he or she is mechanically applying a fixed and rigid set of personal beliefs to define "original intent" and "judicial restraint". For such a judge is beyond rational argument or a re-examination of his or her own beliefs in light of contrary evidence, all the facts in the case, contending moral values at issue and a full appreciation for all the circumstances underlying the adoption of

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[3] See, Corwin, The Passing of Dual Federalism, 36 Va. L.Rev. 1 (1950). A similar pattern may be observed with regard to nineteenth century interpretations of the validity of social legislation in light of the constitutional guarantee of due process; the heyday of the era of "substantive due process":

> [W]hen in the last quarter of the nineteenth century our courts were called upon with increasing frequency to pass on the validity of social legislation, in the transition from pioneer, rural, agricultural America to the urban, industrialized America of today, they turned to an idealized picture of the economic order with which they were familiar, the principles of which had been set forth by the classical political economists. They pictured an ideal society in which there was a maximum of abstract individual self-assertion. This was "liberty" as secured in the Fourteenth Amendment. Hence all limitations upon abstract free self assertion, was presumably arbitrary. Such legislation sought vainly to turn back the current of legal progress in its steady flow from status to contract, and hence was not due process of law. With such a picture of the social order and the end of the law before it as the basis of its conclusion, more than one court disclaimed against legislation forbidding the payment of wages in orders on a company store as subversive of the abstract liberty of the workman reducing him to the position of the infant, the lunatic, and the felon, and arbitrarily setting up a status of laborer in a world which had moved to a regime of contract.

Pound, the Theory of Judicial Decision, 36 Harv. L.Rev. 641, 653-54 (1923).

the law. Such a judge becomes a mechanic [4] applying pre-determined definitions to pre-determined facts oblivious to the fact that he or she is imposing their own unexamined ideological beliefs instead of those of the law giver; rather than a person who weighs the arguments in a self-reflective way -- aware that his or her own beliefs and assumptions of value are important factors coloring the analysis. Such a judge relies upon a rigid and deductive form of reasoning, rather than the inductive and self-reflective method of common law reasoning. The consequences are the adoption of a process by which the decision maker imposes his or her own moral beliefs in defining the meaning of the law and what facts will be permitted to be the "facts" for purposes of the analysis, rather than engage in a reflective and open-minded search for original intent or the moral values the law giver sought to have implemented, skeptical of and reflective about his or her own moral convictions. While it may be acceptable (although I doubt effective or constructive) for a politician or advocate to behave otherwise, it is inherent in and essential for a person occupying the role of judge to be aware and critical of their personal convictions if they are to honestly and reflectively carry out the high responsibility of seeking justice in accord with the moral assumptions underlying the law.

It is in these senses that ideology is relevant to an evaluation of judicial nominees by the Senate. Is the candidate's ideology beyond the pale and is it held with such a degree of conviction as to render the candidate incapable of open-mindedly

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[4] The process of simplifying rules into fixed definitions for deductive application to predetermined facts in the name of a "scientific approach" was called "mechanical jurisprudence" by Pound:

> I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions. In the philosophy of today, theories are instruments, not answers to enigmas, in which we can rest.

Pound, Mechanical Jurisprudence, 8 Colum. L.Rev. 605, 608 (1908). In a similar vein, Felix Cohen observed:

> There are few judges, psychoanalysts or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral problems to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.

F. Cohen, The Ethical Basis of Legal Criticism 3 (1959).

reevaluating his or her convictions in the search for the meaning the law and the facts in the dispute coming before the court. Also, is it an ideology so rigidly held as to prevent the nominee from exercising the most basic function of judging: the skillful and reflective use of legal reasoning to evaluate the facts and the law rather than the discredited and dangerous method of rigid deductive reasoning from fixed assumptions to predetermined conclusions. It is in this sense, that I think Senators seriously concerned about the role of the Senate in the confirmation process, seriously concerned about the institution of judicial review and the integrity of the courts and seriously concerned about fairness to the candidate can and should weigh the ideology and analytical skills of a candidate. It is at this point, where I have serious concerns with the nomination of Judge Bork for the important role of Associate Justice of the United States Supreme Court.

My study of Judge Bork's record, his writings before and after his appointment to the Circuit Court of Appeals for the District of Columbia and his judicial opinions, indicate that he does not exercise reflectively the skill of legal reasoning in his thinking process, that his thinking processes are captured by a rigid ideology of neo-classical economic theorizing and the normative choices underlying it, that he practices a methodology of reasoning deductively from fixed premises to pre-ordained conclusions and that he is not reflective about his ideological convictions in the open-minded way we should require of our judges. Despite repeated protestations to the contrary, Judge Bork ends up doing the opposite of what he proclaims to be most essential in judging -- to follow "original intent" and a course of "judicial restraint". He imposes his own moral views without regard for those of the lawgiver. Moreover, I am convinced he does so not dishonestly, but because he is convinced that legal reasoning consists of rules x facts = decision and that it would be unconstitutional for judges to act otherwise.

These characteristics explain why many of Judge Bork's writings and statements cause consternation in the minds of fair-minded persons and members of this Committee and they explain why there is such a departure from Judge Bork's interpretation of "original intent" and those of the vast majority of scholars who have studied the subjects he has expounded upon. These characteristics also explain why there is such a vast difference in the labels which have been applied to Judge Bork's actions and positions from the perspective of whether he is a judicial "activist" or a believer in judicial "restraint"; whether he slavishly follows the intent of the draftsmen of the Constitution and the Congress in interpreting the law or whether he substitutes his views and values in interpreting the law for those of the lawgiver. It is my conclusion that Judge Bork unavoidably substitutes his beliefs for those of the lawgiver because of the rigidity with which he holds those views and because of his

disdain for what is commonly believed to be the essence of legal reasoning; and worse yet, that he does so oblivious to the fact that he is doing so because he rejects what is the inevitable essence of legal reasoning.

Basic to my concerns about Judge Bork's suitability for the high post for which he has been nominated is the nature of legal reasoning. From all of his writings, it is apparent to me that Judge Bork is a firm follower of a long discredited method of legal reasoning -- analytical positivism. Under this method of reasoning, a method of reasoning similar to that found in geometry, one establishes a fixed major premise of abstract definitions for the rules to be applied, selects those facts consistent with the assumptions underlying the rules, and multiplies one times the other to produce the "right" result. There is, of course, the obvious question of how one goes about establishing the fixed definitions which dictate what "facts" will be allowed to be "facts" for purposes of the analysis and what values will be permitted to be the values underlying the decision. In Judge Bork's case, he usually sidesteps the issue by simplistic moral declarations that there is no right or privacy in the constitution and questionable factual assumptions that employees are free to choose between a job and sterility or takes refuge in the claim that a "scientific model" like that provided by neo-classical economic theorizing establish first premises or that the meaning he chooses to pour into the words used by the law is the only objective meaning possible. These claims are buttressed by the further claim that anything less, including the widely shared belief that the process inherently and unavoidable involves discretion -- albeit -- a bounded discretion, constitutes an unconstitutional exercise of legislative power by non-elected judges. It is the method of reasoning followed by many judges in the late nineteenth century and produced judges like Field, VanDeventer Butler, McReynolds, Sutherland and others who assumed the power to define economic policy in the name of "original intent" and "judicial restraint". They were, of course, the judges who led to the paralysis of government and provoked the extreme threat to an independent judiciary in the form of the court packing plan of President Roosevelt. Hidden beneath the veneer of their mechanical jurisprudence of rules x facts = decision was the assumption of a set of values contrary to the values underlying the Constitution and oblivious to the evolving reality of nineteenth and twentieth century America. Those values included an assumption of the absolutism of property rights and the absolute sanctity of contract rights without regard for the underlying values of the Constitution and evolutions in reality. A further assumption was an absolutism of majority rule in all areas outside of property and contract rights, thereby causing such judges to place little value on individual civil rights in the face of legislation severely limiting such rights. Thus, the Court could find corporations to be "persons" within the meaning of the Fourteenth Amendment without argument or explanation and

the Court could strike down legislation limiting the hours of work for children and women on the assumption that there was equality of bargaining power in what were sweatshops exploiting the poor and the young. Because the terms and conditions of contract rights could not be reasonably limited in light of an absolute right of freedom of contract and the mechanical reasoning by which the definition was applied, such judges ignored the deeper moral objectives for protecting the right to contract freely and the role of the state in defining the terms and conditions of the property and contract rights it would permit its power to be used to enforce. Moreover, their idealized picture of the world underlying their fixed ideological view, caused them also to ignore the reality of the dispute before the court in favor of a non-existent reality necessary to their ideological moral assumptions and reliance upon rigid deductive logic to implement their unexamined assumptions.

I believe that Judge Bork engages in the same form of mechanical jurisprudence, reasoning deductively from rigid and fixed ideological assumptions and views of the world to the predetermined conclusions dictated by a methodology completely at odds with modern insights about the nature of legal reasoning and the burden of weighing the conflicting moral goals of the law and views of reality a judge must carry. Similarly, beneath the claimed objectivity of his evaluation of "original intent" lies a package of moral beliefs prizing property and contract rights and majority rule when it comes to individual civil rights. He does so without questioning his own in-going assumptions and without recognizing or admitting that his assumptions are based on a series of unexamined moral or normative assumptions and the exercise of discretion in determining what values and what facts are relevant to the dispute. A judge rendered incapable or unwilling to re-examine his or her own moral assumptions in determining what the law and facts are and what they mean, is incapable of engaging in the most fundamental function we should expect of our judges -- the artful, reflective and constrained exercise of the discretion we have confided in judges to implement, preserve and protect the basic values we have expressed through our laws. Instead, such a judge becomes an advocate of his or her ideology and ends up imposing his or her own unconsidered moral views upon the frozen reality dictated by his ideology in lieu of those the community has expressed through its laws and expects to be applied reflectively and wisely to evolving reality.

It is by this process, for example, that Judge Bork has repeatedly asserted that the only goal Congress intended for antitrust policy is to maximize "consumer welfare" -- not the concept of "consumer welfare" those words would conjure up in the mind of most people, but the narrow, restrictive and highly technical concept of "consumer welfare" mechanically deduced from the artificial and abstract factual and moral assumptions of neo-

classical economic theorizing. That concept, premised upon abstract and static assumptions of perfect competition in a world of instant and equally shared information by tautologically defined "rational maximizers", [5] is used to sum up the sole goal

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[5] By rational it is meant that individuals are "rational" maximizers of their ends in life and that the observer can tell what people want and how much they want by observing how much they are willing to pay for it. It is claimed by law and economics advocates that economists have no concern for the wisdom or morality of the choices made, theirs is but an accounting function of toting up the choices made. It should be noted that the definition is circular since rational is whatever is chosen and whatever is chosen is rational -- a definition which underlies a philosophy of extreme utilitarianism and one which can be made the basis for a philosophy of radical libertarianism. The late Arthur Leff commenting upon Richard Posner's unquestioned use of the neo-classical concept of "rational" in his book Economic Analysis of Law observed:

> Thus what people do is good, and its goodness can be determined by looking at what it is they do. In place of the more arbitrary normative "goods" of formalism, and in place of the more complicated "goods" of Realism, stands the simple definitionally circular "value" of Posner's book. If human desire itself becomes normative (in the sense that it cannot be criticized), and if human desire is made definitionally identical with certain human acts, then those human acts are also beyond criticism in normative or efficiency terms; everyone is doing as best as he can exactly what he set out to do which, by definition, is "good" for him. In those terms it is not at all surprising that economic analyses have considerable power in predicting how people in fact behave.

Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L.Rev. 451, 480 (1974).

This is the basis for the claim that this form of "economic" analysis is value free and does not involve any subjective criticism of the choices made. The tautology makes criticism impossible once the basic definitions are in place and it is the basis of the superficial claim that the model is "scientific" in the sense of being neutral and objective.

For an exhaustive examination of the underlying assumption of "rationality" in light of several disciplines and empirical studies, see Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. Rev. 1309 (1986). Professor Harrison concludes his impressive analysis of the rationality assumption underlying the "law and economics" movement with the observation: "It has become a particularly virulent form of crabgrass that too many measure by the ground it covers rather than by any real nurturing it provides. Before we

of antitrust policy as: "the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[6] The meaning of "consumer welfare", the basic and only value Judge Bork reads into the legislative intent of the antitrust laws, is limited to conduct which is "output restricting" and hence detrimental to allocative and productive efficiency -- all within the fixed and artificial factual and normative assumptions of the model.

Elsewhere, I have examined in some detail the assumptions and methodology by which neo-classical theorists have derived from what I call an inverted pyramid of reasoning premised on wholly unrealistic normative and factual premises to arrive at these misleading slogans of "rationality", "efficiency" and "consumer welfare".[7] I attach those articles and others as an appendix for anyone interested, but will not disrupt the flow of this statement by a detour into what is a highly complex technical and philosophical debate which I think demonstrates the irrationality of the model and the absurdity of basing legal decisions upon its mechanically derived conclusions. Suffice it to say at this point, these concepts should not be confused with their ordinary meaning. Nor, should one be misled when Judge Bork

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abandon the legal field to economics, we had better measure more carefully the fertile thought of other disciplines." Id. at 1363.

The assumption of "rationality" is also transferred to "institutions Adam Smith never dreamed of" so that corporations and the other complex collectives of modern life can also be assumed to be acting rationally at all times or "as if" they were acting rationally. Errors in judgment as to how to maximize by individuals or collectives are presumably disciplined by the assumed existence of other rational maximizers operating in an assumed perfectly competitive market. For criticisms of the assumptions, see, Flynn, The Misuse of Economic Analysis in Antitrust Litigation, 12 Sw. U.L.Rev. 335, 348 (1981). See also, Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. Pa. L.Rev. 1076 (1979); Schwartz, Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness, 55 Nw. U.L. Rev. 4 (1960).

[6] R. Bork, The Antitrust Paradox 91 (1978).

[7] Flynn, The Misuse of Economic Analysis In Antitrust Litigation, 12 Sw. U.L.Rev. 335 (1981); Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 Utah L.Rev. 269; Flynn, The "Is" and "Ought" of Vertical Restraints after Monsanto v. Spray-Rite Service Corp., 71 Cornell L. Rev. 1095 (1986); Flynn, An Antitrust Allegory, 38 Hast. L.J. 517 (1987).

uses the concepts "competition", "consumer welfare" and "efficiency" that he is using them in the sense in which they are used in everyday language. He is using them in a highly technical and special way; the way dictated by the assumptions, methodology and constraints of neo-classical economic theorizing. It is this theorizing, a school of thought developed well after the adoption of the antitrust laws, which Judge Bork claims the Congresses which adopted the antitrust laws intended the courts to implement.

Everyone that I know of who has made a considered study of the legislative history of the major antitrust laws flatly rejects Judge Bork's assertion [8] -- scholarship Judge Bork has continually ignored except to state that to the extent that Congress intended judges to balance a series of social, political and economic goals in interpreting the antitrust laws, they have charged the courts with an unconstitutional duty. [9] When it comes

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[8] Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L.Rev. 1140 (1981); Fox, The Politics of Law and Economics In Judicial Decision Making: Antitrust As a Window, 61 NYU L.Rev. 554 (1986); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretations Challenged, 34 Hastings L.J. 65 (1982); May, Antitrust Practice In the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880 - 1918, 135 U.Pa.L.Rev. 495 (1987); Pitofsky The Political Content of Antitrust, 127 U.Pa. L.Rev. 1051 (1979); Rowe, The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics, 72 Geo. L.J. 1511 (1984) Schwartz, "Justice" and other Non-Economic Goals of Antitrust, 127 U.Pa. L.Rev. 1076 (1979); Symposium, The Economic, Political and Social Goals of Antitrust Policy, 125 U.Pa. L. Rev. 1182 (1977). See generally, W. Letwin, Law and Economic Policy: The Evolution of the Sherman Antitrust Act (1966); H. Thorelli, The Federal Antitrust Policy -- Organization of an American Tradition (1954); Limbaugh, Historic Origins of Anti-Trust Legislation, 18 Mo. L.Rev. 215 (1953).

[9] Bork, The Role of Courts In Applying Economics, 54 Antitrust L.J. 21, 24 (1985): "In any case, courts are not, I believe, entitled to balance such things as consumer welfare against small business welfare without engaging in a task that is so unconfinedly legislative as to be unconstitutional. That is why I think given the way our present antitrust laws are written -- they could not be written otherwise -- courts must adopt consumer welfare as their sole guide in deciding cases." See also, Bork, Anticipating Antitrust's Centennial, unpublished remarks made before the Association of the Bar of The City of New York, November 15, 1986.

Underlying these statements is the assumption that neo-classical economic theorizing is objective and non-value laden

to determining the legislative history of the antitrust laws, it is patently apparent that Judge Bork's political and economic ideology dictates what he thinks that history means in lieu of what Congress intended. His legal positivism leaves him with no alternative other than to seek fixed definitions to be applied to fixed facts without regard for the intent of Congress or the reality of the dispute. It is clear that because of the rigidity with which he holds his unexamined and unexaminable convictions, that his reading of that legislative history is a case of believing is seeing, rather than seeing is believing. [10] Since

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and that a finding that Congress did intend courts to weigh several values in implementing the antitrust laws would result in a finding the antitrust laws are unconstitutional. So much for original intent and judicial activism, as well as the past century of jurisprudence and legal philosophy. See, Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. Rev. 1309 (1986); Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451 (1974).

10 Judge Bork is perhaps the clearest and most sophisticated exponent of the necessity (value) of courts following a positivistic approach in antitrust analysis, although he does not address the troubling jurisprudential question of whether it is possible. It is a method of coming up first with a model and then fitting reality within the model, rather than examining reality aware of one's own assumptions and convictions in an attempt to understand the values the law giver intended the courts to implement. This process is, of course, the reverse of the common law reasoning process and results in the judge imposing his or her own moral views in lieu of those of the lawgiver. Judge Bork arrives at this position because he is a legal positivist who rejects the mainstream understanding of the nature of legal reasoning and the basic proposition that every legal decision is unavoidable a moral decision because of the nature of language, human reasoning and our methods for perceiving reality. It is an invitation to ignore "original intent" and engage in extreme "judicial activism" by first constructing a model and then imposing it on the investigation of the law giver's intent. Judge Bork is quite open in his advocacy of such an approach; a methodology which underlies his approach to legal analysis generally. He has written:

> The need of the law generally is for the systematic development of normative models of judicial behavior, models which, while they cannot attain, will at least distantly approach the rigor of the descriptive models of basic economic theory. Until we have such models, criticism of the courts for having the wrong goals will generally be empty, the mere assertion of a different set of personal preferences. That is a deplorable condition, since it means that we lack

Judge Bork's study of the history of the Sherman Act is the most extensive and explicit example of his methodology for determining legislative intent, it is a perfect case study for proving or disproving my contention that Judge Bork is a rigid ideologue who misuses legal reasoning to justify imposing his own values and assumptions when interpreting the law and defining the relevant facts on antitrust policy while ignoring the goals of the lawgiver, and thus lacks the appropriate open mindedness and skill with legal reasoning for a position on the United States Supreme Court.

On four occasions I have made detailed studies of the

> valid, objective standards for evaluating and controlling judicial performance. In such circumstance, we cannot attain a "rule of law".
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> Whether one looks at the texts of the antitrust statutes, the legislative intent behind them, or the requirements of proper judicial behavior, therefore, the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws. Only that goal is consistent with congressional intent, and, equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law.
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> . . . .
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> There is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare [as defined by the model]. To abandon economic theory is to abandon the possibility of a rational antitrust law.

R. Bork, The Antitrust Paradox 72, 89, 117 (1978).

In commenting on a similar philosophy of positivism underlying Posner's Economic Analysis of Law, Arthur Leff observed: "all you have ended up doing is substituting for the arbitrariness of ethics the impossibilities of epistemology."
Leff, supra at 456.

Some advocates of the positivism underlying a rigid application of the model, notably Judge Easterbrook, do not even acknowledge or apparently understand the substantial jurisprudential problems with positivism. See the Easterbrook - Tribe debate over the role of utilitarian analysis in Supreme Court analysis of economic issues: Easterbrook, The Court and the Economic System, 98 Harv. L.Rev. 2 (1984); Tribe, Constitutional Calculus: Equal Justice of Economic Efficiency?, 98 Harv. L.Rev. 592 (1985); Easterbrook, Method, Result and Authority: A Reply, 98 Harv. L.Rev. 622 (1985).

legislative intent behind the Sherman Act and the other major antitrust laws. I did so first when writing a book on state antitrust policy; [11] second when I was so startled by Judge Bork's conclusion in a 1966 article asserting the claim that his concept of "consumer welfare" was the sole goal intended by Congress that I went back and reread that legislative history to see if I had missed something (I had not and he did); [12] third when organizing hearings on the goals of antitrust policy for the Senate Antitrust Subcommittee and the Committee on Small Business; [13] and, fourth when considering filing a statement with this Committee on the question of whether to confirm Judge Bork for the United States Supreme Court. I have attached as an appendix a copy of the complete debate in Congress on the Sherman Act as printed in volumes 20 and 21 of the Congressional Record so that the skeptical can compare Judge Bork's claim with my analysis of his claim. What follows is a breakdown of Judge Bork's analysis of the legislative intent and a comparison of his analysis with the words and intent of those who drafted and adopted the Sherman Act.

Judge Bork's original analysis of the legislative history and the one he still abides by despite the unanimous scholarly commentary to the contrary, [14] begins with seven general observations, each of which he claims indicates the inevitability of the conclusion that Congress only intended "consumer welfare" as the sole goal of antitrust policy. The logic of each of these general observations is clearly a case of imposing Judge Bork's in-going and fixed assumption in the eternal verities and truth of the neo-classical model and its technical definitions upon what the Congress intended and meant when adopting the antitrust laws through his rigid form of analytical positivism, rather than an open-minded search for the meaning of Congress's goals in light of the record and contemporary understandings about the nature of legal reasoning. Those generalities are:

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[11] J. Flynn, Federalism and State Antitrust Policy (1964)

[12] Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 (1966). An analysis repeated in R. Bork, The Antitrust Paradox 50 - 71 (1978).

[13] Hearings, Small Business and Society, Senate Antitrust Subcommittee and Small Business Committee, 94th Cong., 1st Sess. (1975).

[14]. See Bork, supra note 12; Rothery Storage & Van v. Atlas Van Lines, 792 F.2d 210 (D.C.Cir. 1986)(also suggesting that several Supreme Court antitrust opinions have been implicitly overruled by virtue of the logic of his assumptions and those of the neo-classical model).

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Generality 1

BORK ANALYSIS

The bills and debate indicate the sole goal of antitrust legislation was the protection of "consumer welfare" (consumer welfare as defined by neo-classical theorizing)
LEGISLATIVE HISTORY: Nowhere in the legislative history if there any mention of the neo-classical concept of consumer welfare. Indeed, neo-classical theorizing did not arise or become generally known until well after the passage of the basic antitrust laws. The most exhaustive study of that history and contemporary events concluded that Congress ignored economists and vice-versa when drafting and adopting the Sherman Act. See H.B. Thorelli, The Federal Antitrust Policy 226, 311 - 29 (1955). While Congress was concerned with preserving the efficiencies (productive, allocative, inventive, wealth distribution, etc) of combinations of capital and labor, that concern was understood in a far more general sense and was to be balanced with several other values and the reality of particular disputes coming before the courts. There is no indication that judges were expected to decide the reality of particular disputes by first positing an abstract, static and artificial model of reality (not then in existence), derive fixed rules from the model, and then apply those unrealistic rules to a predetermined reality. Instead, Congress expected judges to apply common law rules and common law legal reasoning to the reality arising under the antitrust laws and decide cases in accord with the general values Congress sought to achieve in light of the particular reality of the cases arising under the law.

Generality 2

BORK ANALYSIS: The rules of law which Congress foresaw are inconsistent with any other premise other than consumer welfare. Namely, rules prohibiting cartel agreements, monopolistic mergers and predatory business practices.

LEGISLATIVE HISTORY:Such rules as selected by Judge Bork are not inconsistent with the other values (I.e., prohibition on unfair wealth transfers, preserving competition as a process, restrict-

ing monopolistic mergers and curbing the political power of concentrated industries)of central concern to Congress. Moreover, many of the other "rules of law which Congress foresaw" are inconsistent with the narrow and technical neoclassical concept of "consumer welfare". For example, a rule of law prohibiting coercion in forcing an individual to give up a business without regard for the neo-classical "efficiency" concerns (20 Cong. Rec. 1167, colloquy between Senators Salisbury and Hoar); prohibiting undue wealth transfers from consumers to sellers (20 Cong Rec. 1457, remarks of Senator Jones, 21 Cong Rec. 2457, remarks of Senator Sherman; 21 Cong. Rec. 2646, remarks of Senator Reagan); an intention to adopt common law prohibitions on restraints of trade (21 Cong Rec. 2457, remarks of Senator Sherman); a policy of prohibiting undue wealth transfers without regard for "efficiency" (21 Cong. Rec. 2460, remarks of Senator Sherman); the explicit mention of a specific intent to include a rule prohibiting vertical price fixing by the House manager of the bill (21 Cong. Rec. 4089 - 90, remarks of Congressman Culbertson).

Generality 3

BORK ANALYSIS: Congress was very concerned that the law should not interfere with business "efficiency". Changing the prohibition on monopolies from one of banning "monopoly" to banning "monopolization" is a strong indication of a Congressional preoccupation with "efficiency".

LEGISLATIVE HISTORY: There is no analysis of business "efficiency" as that concept is narrowly and technically defined by neo-classical theorizing in the legislative history. There are numerous remarks made with regard to not outlawing the right to combine to form partnerships or corporations and remarks supporting the combination of capital where the nature of the business required such -- a use of the far broader and more general meaning of "efficiency" than the narrow and artificial meaning of allocative and productive efficiency used by neo-classical theorists. (21 Cong. Rec. 2457, remarks of Senator Sherman); (21 Cong Rec. 2605, remarks of Senator Stewart in opposition to the bill because it could be interpreted as banning the formation of partnerships and corporations)(21 Cong. Rec. 4094, rejection of proposal by Congressman Wilson, opponent of the bill advocating a policy of no tariffs and reliance upon laissez faire in lieu of the bill). The concept of "monopolize" was expressly defined in the House debates without reference to the as yet undiscovered and narrow meaning of the concept proffered by neo-classical theorizing to mean "to engross, to obtain by any means exclusive rights of trade to any place or within any country or district, as to monopolize trade." (21 Cong. Rec. 4090, remarks of House manager of the bill, Rep. Culbertson). In the Senate debate where the prohibition on monopoly was changed to one of prohibiting "monopolization", the Senate did so in order to avoid punishing

individual effort and skill resulting in an individual gaining all the business, and not to immunize conduct where such conduct precluded others from engaging in business, even though the conduct might be "efficient" under the dictates of the model. (21 Cong. Rec. 3151 - 52).

Generality 4

BORK ANALYSIS: By expressing great concern for labor and agricultural combinations, yet failing to expressly exempt them from the act, the proponents of exempting such aggregations were somehow expressing an intent to preclude the courts from weighing values other than "consumer welfare" in interpreting the Act.

LEGISLATIVE HISTORY: This argument by Judge Bork is confused and confusing, since it seems to be suggesting one can derive an affirmative intent to preclude the courts from considering values other than consumer welfare by the failure to exempt labor and farm organizations from the bill; combinations for which many in Congress expressed social and political concerns. Such a convoluted stretching of the record would surely amaze the members of Congress which adopted the bill. The reason they were not expressly exempted is that Senator Sherman and others believed that "non-business" combinations of laborers and farmers formed "purely for defensive purposes" against business trusts were not intended to be covered by the bill. They were viewed as the social, political and economic (via unfair wealth transfers) victims of business interests; beneficiaries of the bill by virtue of securing to them the benefits of a competitive process for social, political and economic reasons. (20 Cong. Rec. 1458, 21 Cong. Rec 2562, remarks of Senator Sherman "They are not business combinations")(21 Cong. Rec. 2606, remarks of Senator George in opposition to the bill in the name of laissez faire and efficiency); (21 Cong. Rec. 2726 - 2731, debate over whether the bill applies to labor and agricultural organizations).

Generality 5

BORK ANALYSIS: Given the narrow view of the commerce power at the time the Act was adopted, it is doubtful Congress intended to give courts the power to make broad social and political decisions. Ends of legislation under the commerce power were generally thought to be "commercial" in nature.

LEGISLATIVE HISTORY: The debate over the scope of the commerce clause was focused on the means by which Congress could regulate, not the ends for which it could regulate. The debate is replete with statements of the political, social and economic objectives of the legislation. Also, analogies to the constitutionality of legislation enacted for moral ends like transporting liquor to states prohibiting its sale in order to protect the moral judgment of the state seeking to ban liquor sales were relied

upon to support the propriety of relying on the Commerce power in enacting the law for social and political goals.

Generality 6

BORK ANALYSIS: Congress recognized that broad discretion was being granted to the courts, "but not one speaker suggested that discretion included the power to consider any values other than consumer welfare."

LEGISLATIVE HISTORY: This statement is difficult to believe. Once again, Judge Bork is using the technical concept of "consumer welfare", a concept unknown when the Act was adopted and not discussed in the legislative history of the Act to pour his own ideological beliefs into the words used. Moveover, the debate is replete with expressions of preventing unjust wealth transfers, concerns for social values, curbing the political power of trusts, securing equality of opportunity for every person seeking to engage in trade, precluding coercion in excluding persons from business or forcing them by contract to resell at prices dictated by suppliers without regard for "efficiency" as defined by Judge Bork's ideology, etc.

Generality 7

BORK ANALYSIS: The complete absence of any values which conflict with "consumer welfare" by advocates of the Act, "itself compelling evidence that no such values were intended.

LEGISLATIVE HISTORY: Once again, Judge Bork's invocation of the technical and artificial meaning of "consumer welfare" is being used to define what in fact members of Congress said and meant when they invoked the broader and more general concept of competition and the welfare of consumers. The overriding concern was unfair wealth transfers from consumers to producers without regard for the technical concern for what neo-classical theorists call efficiency; a major concern for guaranteeing every person's effort would succeed or fail on the competitive merits a major concern for curbing the political power of the economically powerful; and values like guaranteeing success or failure on the merits by banning practices like vertical price fixing. The inability of Judge Bork to read the legislative history open-mindedly and pay any attention to the numerous and repeated statement of these values, whether one likes or agrees with them or not, betrays a mind so captured by the theology of neo-classical economic theory that he is incapable of reflectively reading legislative history and ends up imposing his own moral values in lieu of that expressed by the law giver.

Judge Bork's analysis of the legislative history of the Sherman Act then proceeds into an examination of "explicit policy statements", statements which he has selected from the record

while ignoring or dismissing others, and imposes his ideological meaning for words used on the far more general and complex meaning of the words used by the members of the Congress which adopted the Act. He begins by quoting the language Senator Sherman in his draft bill of 1890, S. 1, reported by the Senate Finance Committee. (9 J.L.&Econ. at 15). The bill prohibited agreements, combinations and contracts made with a view, or which tend to prevent full and fair competition and those designed, or which tend to advance the cost the consumer. Rather than inquire what Senator Sherman and the Committee meant by "full and fair competition" and "advance the cost to the consumer", Judge Bork concluded that "it is hardly a means of preserving social values that consumers are not willing to pay for." The mental slight of hand going on is to immediately impose the tautological neo-classical concept of "rationality" for Senator Sherman's objectives for insisting on "full and fair competition" rather than examine Senator Sherman's statement concerning the terms used. Senator Sherman's meaning for "competition" was to guarantee every person in trade equality of opportunity (competition as a process). By the same token, Judge Bork immediately leaped to the conclusion that the term "advance the cost to the consumer" meant what his ideology dictated -- the neo-classical meaning of "consumer welfare" or that "consumer welfare" must be measured in terms of what producers believe to be best in a static and perfectly competitive market. "Consumer welfare" in this sense is a paternalistic concept premised upon an absolutism of the property rights and "rationality" of producers and sellers, rather than consumer welfare in the sense of wealth transfers caused by a breakdown in the competitive process.

One only needs to read Senator Sherman's speech accompanying his report of the bill from the Finance Committee (21 Cong Rec. 2156 - 58) to determine that Senator Sherman had no idea of the neo-classical meaning of competition or "consumer welfare". Instead, Senator Sherman's meaning for these terms included: to give the courts the means for dealing with "the industrial liberty" of the people; to guarantee "the right of every man to work, labor and produce in any lawful vocation and to transport his productions on equal terms and conditions and under like circumstances"; "this bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer"; the bill is aimed at curbing the "law of selfishness, uncontrolled by competition"; to control the "kingly prerogative, inconsistent with our form of government" of concentrated economic power, compelling refusals to deal without regard for whether they were "efficient" or not; and protect the political power of government by precluding the wielding of undue economic power by private economic power centers.

Many of these values were expressly referred to by Judge Hand in United States v. Aluminum Co. of America [15] and in United States v. Associated Press, [16] opinions Judge Bork characterized in his article as the "judicial equivalent of free verse or 'tennis with the net down'". Aside from disparaging the intellectual qualities of one of the great judges of this century, Judge Bork's characterization of Judge Hand's analysis of the legislative history is clearly that of an ideologue imposing his view of what the legislative history ought to be, rather than a reflective attempt to determine what the Congress intended. Only by ignoring the words used, the historical context in which they were used and substituting one's own formula for the debate which took place, can one criticize Judge Hand's reading of the legislative history of the Sherman Act.

Judge Bork's study also takes isolated statements and places his own ideological twist on them in an attempt to justify his "consumer welfare" only value for antitrust policy. For example, Judge Bork quotes Senator Sherman for the proposition that the sole touchstone for illegality is raising prices to consumers: "If they (trusts) conducted their business lawfully, without any combinations to raise the price of an article consumed by the people of the United States, I would say let them pursue that business." 21 Cong. Rec. 2569, quoted at 9 J.L. & Econ. at 16). That quote is followed immediately (in the Congressional debate but not Judge Bork's article) by an example of what Senator Sherman considered unlawful and a displacement of competition; an example vesting in a competitor a right to sue under the proposed Act without regard to whether prices were raised to consumers:

> I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; but when they combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and will sell their product at a loss or give it away in order to prevent competition , and when that is established by evidence that can not be questioned, then it is the duty of the courts to intervene and prevent it by injunction and by the ordinary remedial rights afforded by the courts.

21 Cong Rec. 2569, remarks of Senator Sherman.

It should be apparent to all but the committed ideologue that Senator Sherman was also concerned with the rights of a competitor unfairly excluded from business without regard for whether prices to consumers were raised or lowered and that the conclusion that Senator Sherman's statement describing what was

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[15] 148 F.2d 416, 428 (2d Cir. 1945)

[16] 52 F. Supp. 362, 370 (1943).

"unlawful" was intended to cover far more than the narrow goals attributed to antitrust policy by neo-classical theorizing. In Senator Sherman's view, if a competitor were excluded from business by the means he described, it would matter not whether neo-classical efficiency were served. The exclusion itself would violate the law.

Other examples abound. For example, Judge Bork attributes a "consumer welfare" only purpose to other members of the Senate Judiciary Committee, draftsmen of the final version of the Sherman Act. Senator Gray of Delaware it is claimed is a "consumer welfare" only advocate because he introduced an amendment using the same language as Senator Sherman's original bill; viz., prohibiting agreements which "prevent full and free competition" or "advancing the cost of any article to consumers" 21 Cong Rec. 2657. Once again the meaning of these terms is what is at issue rather than simply cramming them into the neo-classical model. Senator Gray's amendment was expressly designed to achieve the same broad goals that Senator Sherman sought to achieve and strengthen the remedies provided by providing for contractual voidness as a remedy in any suit by interests found to be violating the Act without any mention of the "efficiency of the contract sought to be enforced. Nowhere did Senator Gray suggest that he was seeking to advance as the sole goal of antitrust policy the dictates of an abstract neo-classical model not yet invented or the normative assumptions underlying such a policy. It is clear that he was willing to bar the enforcement of any contract by one violating the law without regard for whether the contract itself violated the law, let alone was an expression of "efficiency" or not.

One of the major House proponents of the Act, Representative Heard of Missouri, is quoted at length by Judge Bork (9 J. L. & Econ. at 19) in what he claims is the clearest statement of the "consumer welfare" only value. Congressman Heard, was primarily concerned with unjust wealth transfers, not the maximization of economic "efficiency" as defined by the model. He saw as a basic purpose of the bill "to crush out those unholy and defiant combinations which for the enrichment of the few persons have made paupers of millions of honest and helpless people." (21 Cong Rec. 4101).

Judge Bork's analysis of the proposed rules of law intended to be implemented by the Congress -- cartel agreements, monopolistic mergers and predatory tactics -- as evidence that the sole goal intended was "consumer welfare", overlooks the fact that the other goals mentioned by Congress are also consistent with outlawing these catagories of conduct. Moreover, it fails to take account of other rules of law contemplated by Congress but inconsistent with the assumptions underlying neo-classical theorizing. For example, the express rule prohibiting vertical price fixing contemplated by Representative Culbertson (supra)

and criticized by Representative Morse, (21 Cong Rec. 5953) -- a major opponent of the bill, is one that every neo-classical theorist castigates as inconsistent with the model. It is a rule Congress foresaw and one not mentioned by Judge Bork and one that most antitrust experts agree he would vote to overturn at the first opportunity because neo-classical theorists are compelled to believe that all vertical restraints are per se lawful by the assumptions underlying their abstract and static model-- Congress to the contrary notwithstanding.

It was precisely because the Executive branch misunderstood some of Congresses goals when enacting the Sherman Act in the early years of antitrust enforcement that Congress adopted the Clayton Act and the Federal Trade Commission Act 24 years after adoption of the Sherman Act. Few would argue that goals behind prohibiting price discrimination, the practices outlawed by Section 3 of the Clayton Act, the specific goals sought by outlawing more than just "monopolistic mergers" in Section 7 of the Clayton Act and the creation of an expert administrative agency to control "unfair methods of competition" are far broader than the narrow values of neo-classical theorizing. Yet many of these prohibitions were clearly intended by the draftsmen of the Sherman Act and are completely ignored in Judge Bork's analysis. His book, The Antitrust Paradox, indicates that he would enforce none of these explicit rules subsequently adopted by Congress, since they are inconsistent with the assumptions and predictions of his ideology.

Judge Bork goes to great lengths to demonstrate that the draftsmen of the Act sought to preserve "efficiency"; the narrow and technical meaning of that term derived from the artificial and unrealistic assumptions of the model. That concept of "efficiency", unknown at the time of the debate, and the draftsmen's concept of efficiency do not equate with the model's technical and narrow concept of efficiency. As mentioned previously, Senator Sherman was concerned about a series of goals and values, most of which he saw as essential without regard for the "efficiency" of the conduct excluding a competitor, vesting undue power in the hands of the few, or unjustly transferring wealth from consumers to producers. (21 Cong. Rec. 2456 - 2458, remarks of Senator Sherman, and remarks relying on Richardson v. Alger, Sup. Ct. of Michigan quoted at 2458). Unlike the unreal world of the model where all practices are either pro-"competitive" or anti-"competitive" given the assumptions of the model, Senator Sherman recognized that many practices in reality can injure competition, in the sense of the rights of the individual to fairly compete, without regard to the question of whether there has been a reduction of output as those terms are defined today by proponents of the model. (21 Cong. Rec. 2457, remarks of Senator Sherman). So too, leading members of the House when they saw the Act as banning vertical price fixing without regard to presumed efficiencies realized by the proponent of the restraint

or "free riding" (that marvelous and imaginary creation of neo-classical theorists to justify wealth transfers from consumers to sellers in the case of vertical restraints without regard for the intent of Congress or the reality of the dispute).

Judge Bork attaches particular significance to the fact that Congress changed the prohibition upon "monopoly" to a prohibition on "monopolizing". (9 J. L & Econ. 28 - 30). Clearly Congress was concerned with not making it a crime for an individual to obtain a monopoly by virtue of what Judge Hand called in his opinion maligned by Judge Bork in Alcoa "superior skill, foresight and industry." Judge Bork interprets the debate as one evidencing a preoccupation with limiting interpretation of the act to an "efficiency" goal only. As Judge Hand noted and as Senator Hoar expressly stated, the change was intended to make clear that Congress was concerned by the means by which one obtained a monopoly. In Senator Hoar's words one who "got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business." (21 Cong. Rec. 3152, remarks of Senator Hoar). Obviously, the Senate was concerned with defining the line about illegal conduct and not suggesting that any means by which a monopoly was obtained -- even though "efficient"-- was considered to be lawful. If, for example, it was "efficient" for a firm to buy up all the hydro-electric power available for future needs to manufacture aluminum, under Senator Hoar's standard (and Judge Hand's in the Alcoa case) it would constitute illegal monopolization since it would constitute means which made it impossible for other persons to engage in fair competition and the possession of power to unfairly transfer wealth from the consumer to the producer. Under Judge Bork's standard, the conduct would be "efficient" and hence not unlawful monopolization.

Contrary to Judge Bork's assumption that proponents of viewing the Sherman Act as a charge to the court's to weigh a series of values and Judge Hand's express finding of such in the Alcoa and Associated Press case, [17] the recognition of a series of values underlying the Sherman Act is not the advocacy of a delegation of powers to the courts that is "unconfined." (9 J.L. & Econ. 35 - 36). Judge Bork believes it to be the advocacy of "unconfined" discretion because: 1. He is so committed to the

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[17] Along with repeated statements to that effect by the Supreme Court and other Courts too numerous to count. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941); Associated Press v. United States, 326 U.S. 1 (1945); Northern Pacific Ry. v. United States, 356 U.S. 1 (1958).

ideology of neo-classical theorizing that he can not permit consideration of factors inconsistent with its underlying normative assumptions and disruptive of its mechanistic reasoning; 2. He believes the other values stressed by Congress and recognized by the courts and commentators are meaningless "poetry" rather than recognize that all the values involved are unavoidably normative ones; and, 3. His underlying and simplistic positivism refuses to recognize that legal reasoning, his own as well, unavoidably entails discretion and the weighing of bounded but conflicting values in the analysis of the reality coming before the courts under the generality of the standards enacted by Congress and the facts unique to individual disputes.

One could go on with instances of Judge Bork's manipulation of the legislative history of the antitrust laws to accord with his ideology of what the law ought to mean rather than a reflective and open-minded search for what the draftsmen of the basic antitrust laws intended they be interpreted to achieve in the evolving complexity of reality. Suffice it to say, "the legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency."[18] The interesting question and the objective of this exercise is to demonstrate what I believe to be the basic objection to Judge Bork's nomination to sit on the Supreme Court. That is that he is a closed minded ideologue who follows a discredited method of legal reasoning; a method which results in his imposing his own values in lieu of the commonly understood values underlying the Constitution and basic laws like the antitrust laws. Moreover, his methodology of reasoning is so excessively positivistic and contrary to legal reasoning that he does so in a manner which causes him not to address the facts and consequences of the particular dispute before him for decision, but to address the unrealistic facts and consequences of the factual assumptions underlying his inflexible model for decision.

These attributes go to the heart of the art of judging. They preclude the judge from engaging in the wise, reflective, thoughtful and fair adjudication of the reality which comes before the court in light of the values and goals the law giver intended the judge to evaluate. It results in the judge believing that he or she is engaged in applying "original intent", although the "original intent" applied is one which others can not find in the history and circumstances surrounding the law involved. It results in a judge who believes he or she has absolute and immutable truth warranting the mechanical overruling of prior precedent inconsistent with the judge's fixed model for "truth", rather than judicial restraint and the reflective and considered study of the reasoning of the prior decision and the values upon

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[18] Hovenkamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 249 (1985).

which it is based. It results in the judicial activism of the committed ideologue driven to impose his or her version of the truth, rather than engaging in a careful search for the truth by a humble jurist aware of his or her own limitations and the complexity of legal reasoning. It results in the rejection of the basic lesson of the last fifty years of jurisprudence, that every legal decision is unavoidably a moral decision -- a question of ought -- and that the most dangerous judges are those who are rendered incapable of assuming the heavy burden of deciding cases in accord with this insight and living daily with the difficult burden of reconciling their own moral views with those expressed by the community through law.

It is for these reasons that I believe the Senate should withhold its consent to the nomination of Judge Bork to sit on the United States Supreme Court. I do so with reluctance since I believe Judge Bork to be an honest and decent man, a man of integrity, intelligence, wit and charm. He is a man whose scholarship has been challenging and creative, although doctrinaire and incomplete for he does not even acknowledge those with different views. Judge Bork lacks the capacity for skillful self-reflection and he rejects the essence of the methodology of legal reasoning in favor of a non-reflective and mechanical legal positivism inherent to the methodology of the polemicist. The values underlying his view of the world are relevant to the disputes courts must decide, but they are not the only values which must be considered. His single-minded insistence to the contrary, an insistence carried to the point of concluding that to engage in the essence of legal reasoning constitutes an unconstitutional assumption of "legislative powers" by the judiciary, is so at odds with the nature of the job that it renders him unfit for the job. I say this without regard for the underlying ideology which he holds -- for I would and the Senate should say the same thing about a candidate so captured by a left-wing or other ideology that it renders him or her incapable of self-reflection, an open-minded evaluation of the law and reality they may be called upon to resolve, and a capacity to live with the tension of carrying out the moral responsibilities of the role of a judge while living with their own personal moral values.

Regardless of the outcome of this particular nomination, something of long term significance is going on in these hearings. That is the re-definition of the role of the Senate in the advise and consent function for judicial nominees. Advocates on either side of this particular nomination must use great care to see that the record left establishes that the Senate does not unduly politicize the process by making the touchstone of a vote for or against this nominee solely whether they happen to agree or disagree with the political and moral views of the candidate. The record should reflect that the Senate carefully exercised its role of determining whether the candidate has those qualities of mind, humility of personality in the face of the heavy moral

burdens of the role and skill with legal reasoning required of a judge on our highest court. These are qualities not easily measured in any person, but I must reluctantly conclude that the record left by Judge Bork and the record established by these Hearings do not satisfy these standards.

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September 21, 1987

Members of the Judiciary Committee
United State Senate
Washington, D.C.

Honorable Members of the Senate:

I wish to share the following observations after having listened to many hours of testimony during the four day interrogation of Judge Bork.

As a lawyer, the dialogue and repartee has been intellectually intriguing and challenging. I am not a constitutional lawyer, but I can follow the nuances expressed and thus appreciate distinctions such as that between the merits of a case and the legal issues brought before a court for decision in a particular case. On every occasion when I have heard Judge Bork explain the procedural or substantive issues that were to be decided in the case before him, his explanations have posited sound legal arguments. This stands in stark contrast to the ephitets bandied about during his questioning.

What disturbs me, more as a citizen than as a lawyer (since I am accustomed to advocacy that sidesteps truth searching) is that after Judge Bork has enunciated the legal logic behind his decisions, his opponents pretend to never have heard or understood him and they repeat the same simplistic and misleading characterizations of his opinions. This is good politics to be sure, but it is unfair to the citizenry who cannot follow the fine legal nuances and complexities that defy 30-second capsulizations on the 6 O'clock news. Those citizens must to some extent rely on you senators to weigh the judicial performance of Judge Bork for them, and those citizens expect (perhaps naively) a fair and impartial evaluation. Instead, they are receiving a politically tainted and biased analysis, more befitting a local newscaster than a United States Senator.

Surely Circuit Judge Bork, the jurist, and Robert Bork, the man, think differently than Messrs. Kennedy and Metzenbaum. But just as surely when their liberal ideology will be represented by an appointee named by a future Democratic President, they will look back and shudder to think that the test of his approval by the Senate might be measured by the fickle popularity of his views, instead of by his abilities as a judge.

I urge that you reconsider the evaluation of Judge Bork and retrace the politically motivated mis-steps taken to date. Do not evaluate him based upon his popularity, nor upon whether he agrees with you, nor upon whether the balance of power in the Court will shift. His popularity is irrelevant to his judicial performance; his views (or anyone else's) will naturally disagree with nearly half the Senate; and the Court must always be in flux to survive as a growing, adaptive institution.

Lastly, Judge Bork's application of "original intent" will not stagnate the Court nor reverse 30 years of civil rights achievements. Instead it will move the Court to a new center of adjustment that more accurately reflects today's society, at no real expense to individual or minority rights. That bogeyman of reactionary backsliding has been exposed as a creature of the liberal's imaginative advocacy and political paranoia.

VOTE FOR BORK and return to your other business knowing that to the Court has been added a distinguished jurist.

Respectfully,

THE BOCCARDO LAW FIRM

By Byron C. Foster
BYRON C. FOSTER

BCF/kw

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SCHOOL OF LAW FACULTY

September 29, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Judiciary Committee
United States Senate
Washington DC 20510

Re: Griffin Bell / Robert Bork

Dear Senator Biden:

The New York Times commented on its first page today that Griffin Bell "compiled a strong civil rights record in 15 years as a Federal Court of Appeals Judge." That is incorrect. Mr. Bell is wholly unqualified to testify as to anyone's "sensitivity" to civil rights.

During the period of massive resistance to desegration, Griffin Bell was the volunteer chief of staff to the governor of Georgia in "reinforcing Georgia's anti-integration armor." (Atlanta Constitution, 7/13/59, p. 1) Later, as a federal judge, Mr. Bell cast the deciding vote and wrote the opinion for the court upholding an anti-integration strategy, that he himself had been instrumental in devising. Calhoun v. Latimer, 321 F.2d 302 (1963).

A 74-page ACLU analysis of Mr. Bell's record as a federal judge concluded that he had not advanced civil rights and that his opinions "frequently served to indicate his opposition to federal intervention" in some school segregation issues.

When Mr. Bell became Attorney General, he reluctantly, under pressure, gave up his memberships in private clubs that discriminated against blacks and Jews. Upon leaving the Justice Department, Mr. Bell "gleefully" announced that he had "rejoined all of my old [segregated] clubs and a few new ones." (N.Y. Times, 1/3/81, p. 9)

The Times reports that, in Griffin Bell, "Judge Bork's supporters had finally found the star witness they had been waiting for." (9/29/87, p. 1) Indeed they had.

Sincerely,

Monroe H. Freedman
Professor of Law

9/27/87 Edition

The New York Times

That Was the Real Bork Who Testified

By Joseph Goldstein

NEW HAVEN

Who is the real Robert H. Bork? This is the question "all of us are asking," Senator Edward M. Kennedy said after listening to 27 hours of Judge Bork's testimony. I believe I know the answer.

I know Judge Bork well. I have been a member of the Yale Law School faculty for more than 31 years, and was a colleague of his during during his entire tenure at Yale. I served with him on faculty committees and audited sessions of the seminar he offered with Alexander M. Bickel.

During the last 10 years I have devoted most of my time to teaching constitutional law. I have been a registered Democrat for all of my voting life and, for many years, I have supported the work of the American Civil Liberties Union, the N.A.A.C.P. and the Planned Parenthood Association.

Joseph Goldstein is professor of law at the Yale Law School

I take Senator Kennedy's question to mean that he and other Senators who publicly committed themselves in advance of the hearing are prepared to change their minds if they learn they have wrongly assessed the nominee.

In essence, the Senator is asking these questions:

"Is the real Robert Bork the person I have described as racist, sexist and an opponent of individual liberty and equal justice, who will disregard Supreme Court precedent, roll back the clock and uproot decades of settled law in order to write his own ideology into law?"

Or, "Is the real Robert Bork the person whose testimony before the committee and whose record as Solicitor General and as court of appeals judge demonstrates that he is sensitive to the rights of minorities and women, understands that every person is entitled to the equal protection of the law, recognizes the importance of precedent, even if developed in a manner contrary to his judicial philosophy, and strongly believes there is no place for a personal political or social agenda in the way Justices must carry out their work?"

The real Robert Bork is the latter. Any U-turns have not been his — but will have to be made by supporters and detractors who brought to the hearing prematurely drawn portraits of how Judge Bork will behave if he becomes Justice Bork.

Judge Bork was not disingenuous in his testimony. He was for the first time in his career publicly addressing as such than hypothetical the question, "How will I carry out the work of a Justice of the Court that has the final say?" This is also the question the Senate Judiciary Committee is asking of him and that he has forthrightly sought to answer.

Judge Bork has faithfully performed each of his previous jobs in accord with its distinctive purpose. He has explained how he intends to carry out the special responsibilities of a Justice of the Supreme Court. He recognizes, and he asks the Senate to recognize, the differences between the classroom and the courtroom; between [illegible] and judicial decision; between teacher, Solicitor General and court of appeals judge. What he may have said or done in carrying out his duties in other settings must not be confused with what he will say or do as Justice Bork.

Judge Bork appreciates the awesome burden that comes with being a Justice on the highest court. Thus, he can say with conviction that he will go to the Court with open eyes and ears, eager "to read the briefs and discuss things with counsel and discuss things with my colleagues." He speaks with a commitment to the rule of the Constitution, to constructions of it by the Court and to the rule of law.

That is his agenda — and it is the only proper agenda for a Justice of the Supreme Court. The political and social agendas of his supporters or detractors must not be tagged to him. Some of these seem not to have understood that Judge Bork has been trying to respond to questions he has never before addressed publicly — how he will go about his work as a Justice of the Court. Judge Bork will not forget, as Justice John Marshall stressed in McCulloch v. Maryland, that his task will be to expand a written Constitution — "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

He will be what he is — a thoughtful, decent human being who understands and will take seriously the duties of his office.

Submitted to the Record by

Senator Simpson

AFFIDAVIT

Comes now the Affiant, James F. Gordon, Senior United States District Judge for the Western District of Kentucky, being of lawful age and first duly sworn on his oath, deposes and states:

The Affiant publishes this Affidavit to refute and take issue with certain answers made by Judge Robert Bork to questions placed to him by Senators Thurmond and DeConcini in the presently occurring confirmation hearings, and to clarify two matters mentioned in Affiant's letter to Senator Biden of August 24, 1987, filed with the Senate Committee on the Judiciary.

1. In Affiant's letter above mentioned, written to Senator Biden, the Affiant stated he did not receive Judge Bork's changed, proposed majority opinion until "around the first part of November, 1982." That statement should have read "around the latter part of September, 1982." The error resulted from Affiant's erroneous recollection, as Affiant no longer had available to him his files relative to the Vander Jagt case, Affiant having ceased all judicial service due to ill health in January, 1984. Likewise, reference by Affiant in said letter to Judge Robb's illness as being caused from cancer was in error, as the illness suffered in 1982 by Judge Robb at the time in question was a broken hip. Affiant can only explain this error in recollection as having arisen from the fact that Affiant understood Judge Robb's subsequent cause of death was cancer, and thereby assumed his illness in 1982 was related thereto. In all other respects said letter from Affiant to Senator Biden is true and correct.

2. At the time Affiant's letter to Senator Biden became public, on or about September 9, 1987, White House spokesman Fitzwater is reported by the press as having stated Judge Gordon "has long had disagreements with Bork." Nothing could be more

false. Affiant Gordon never saw or met Judge Bork in person until the morning of March 19, 1982, when the two of them met with Judge Robb to hear the Vander Jagt appeal arguments. The three spent approximately three hours together in the courtroom and approximately one hour in conference. There was no disagreement in conference. In fact, there was total agreement by all Judges to the denial of relief to Vander Jagt, et al, and that Judge Bork would draft the majority opinion on the ground of "remedial discretion" and not "Congressional no standing." Since said date of March 19, 1982, Affiant has not seen Judge Bork, nor has Affiant had any telephone conversation with Judge Bork, nor any communication with Judge Bork other than the letter of September 24, 1982 and Judge Bork's memorandum of October 8, 1982, filed of record herein, wherein in the latter for the first time, Judge Bork advised Affiant of his (Judge Bork's) alleged meeting with Judge Robb and Judge Robb's alleged change of position to "Congressional no standing" from "remedial discretion," as established in the D. C. Circuit in Riegle v. Federal Open Market.

3. After receipt of Judge Bork's opinion about September 20, 1982, changed to "Congressional no standing," Affiant sought to contact Judge Robb by telephone and was advised by Judge Robb's office staff that Judge Robb was not available to talk by telephone due to illness. Affiant never discussed this matter by telephone with Judge Robb, for subsequently on October 5, 1982, Affiant received Judge Robb's memo addressed to Affiant and Judge Bork, expressing surprise at Judge Bork's change of position to "no standing" and stating he recalled no meeting with Judge Bork or any change of position by him (Robb) away from the Riegle doctrine, as was being claimed by Judge Bork. As to Judge Bork's claim of meeting with Judge Robb, Affiant, like Judge Robb, does not believe Judge Robb changed his position. Judge Robb had written the majority opinion in Riegle and was fully and firmly committed to its doctrine of "remedial discretion." This belief by Affiant is fully confirmed by Judge Robb's memo to Affiant explaining his long held standing beliefs and denying any change

of position, and directing Affiant to draft the majority opinion based on Riegle as initially agreed upon in the conference of March 19, 1982.

4. In answer to a question put to him by Senator Thurmond, as to why he (Judge Bork) changed his position from the agreed reasoning in conference to "no standing," Judge Bork responded he found it "wouldn't write," whatever that means. The doctrine of remedial discretion wrote all right for the Affiant as a majority opinion, was entered as such, and subsequently denied cert. by the Supreme Court which, to use one of Judge Bork's expressions, means the Supreme Court didn't find Affiant's majority opinion "too outrageous." Subsequently in the hearings, Senator DeConcini asked Judge Bork a similar question as to why the change of position, to which Judge Bork responded something to the effect of an anticipated En Banc hearing coming up regarding paying chaplains and some other cases anticipated by him (Judge Bork), and he didn't want to write on "remedial discretion" and have it subsequently set aside. Judge Bork is not entitled to have it both ways. "Won't write" on the one hand and "might be set aside" on the other. "Remedial discretion" is alive and well in the D. C. Circuit and Congress has standing to sue - no thanks to Judge Bork.

5. Judge Bork admitted to Senator DeConcini he just forgot about Judge Gordon "down in Kentucky" and at the time didn't think "it was any big deal." To Affiant as a Judge and to every litigant, every case is a "big deal." Affiant knows of no judicial measure that tests each case on the basis of whether or not it is a "deal," big or little. Affiant was a legally constituted member of the appellate panel in Vander Jagt, et al v. O'Neill, et al. Affiant's vote in the disposition thereof was equal in weight to Judge Bork's. Judge Bork well knew March 19, 1982 the judicial position of the Affiant and Judge Robb in the decision of the matter, and wrote on no standing in spite thereof. The question for the Senate to decide is why did Judge Bork attempt to alter the decision when one Judge (the Affiant) was

back in Kentucky and one Judge (Robb) was ill? Affiant is convinced that Judge Bork hoped to mislead the Affiant into agreeing to accept the "Congressional no standing doctrine" while erroneously believing Judge Robb had changed his position in the matter. Judge Bork's past writings and utterances show commitment to "Congressional no standing." He wanted that to become the law of the Circuit. Judge Bork asserts that Affiant's claim of Judge Bork's efforts being designed to have his (Judge Bork's) views become the majority view is "preposterous." Not so, for if Affiant had fallen for the planned deception, and approved the changed opinion, the "run would have been over" and Judge Bork's "Congressional no standing" would have been the majority opinion and eligible for filing and eventual entry, just as Affiant's majority opinion on "remedial discretion" was subsequently filed and entered as the opinion of the Court with Judge Robb's agreement.

6. Lastly, Affiant addresses Judge Bork's effort to make it appear that Affiant's letter to him (Judge Bork) dated December 17, 1982, was an indication at that point in time the Affiant was not upset by his (Judge Bork's) change of opinion activities. Not so. The "yuletide letter" was then written for three reasons; the first being common courtesy - a treatment not received by Affiant from Judge Bork in the fall of 1982, who he (Judge Bork) just "forgot" to keep advised as Senator DeConcini established; secondly, Affiant and Judge Robb had at that point in time (December 17, 1982) successfully thwarted Judge Bork's efforts to mislead and establish "no standing," thus winning their controversy with Judge Bork; and thirdly, Affiant knew he was to sit with the D. C. Circuit in 1983 and did so. Affiant had Judge Bork's "number" by this time as a man not forthright with his colleagues and Affiant knew at this time (December 17, 1982) how to protect himself in the future in situations with Judge Bork. Nothing could be gained by any vendetta with Judge Bork with whom Affiant might have to sit again in 1983 or which might be upsetting to the friendly relations with his Circuit colleagues

where, as a visiting Judge, the Affiant was, in effect, a guest. But this does not mean, as Judge Bork would have everyone believe, that Affiant's complaints against him are of recent manufacture. Judge Bork, regardless of what he says now, well knew Affiant was upset in 1982, and at one point in his testimony to Senator DeConcini admits that "through the clerks he had heard something and maybe that's why he wrote" Affiant. Otherwise, why would Judge Bork write to Affiant the memo of October 8, 1982, full of apologies? Judge Robb had already on October 5, 1982, written Affiant and expressed surprise at Judge Bork's actions and instructed Affiant to write a majority opinion based on Riegle. Affiant mentioned the experience with Judge Bork privately in 1982 to several friends and associates. When Judge Bork was nominated for the Supreme Court, the Affiant felt duty bound to make the fact public as Affiant does not believe one who would do what Judge Bork attempted to do to his colleagues in Vander Jagt is due to receive such an honor at the hands of the people.

Further, the Affiant saith not.

Executed on this the 27th day of October, 1987.

James F. Gordon

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

I, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing instrument was signed and acknowledged before me by James F. Gordon, and the same was subscribed and sworn to before me by him to be his free act and deed, on this 27 day of October, 1987.

NOTARY PUBLIC: State-at-Large
My Commission Expires: 11-12-88

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GEOFFREY C. HAZARD, Jr.
Sterling Professor of Law

(203) 432-4971

September 16, 1987

Honorable Joseph H. Biden, Jr.
Judiciary Committee
United States Senate
Washington, D.C.

Dear Senator Biden:

This statement is submitted in connection with the Committee's consideration of Robert Bork for confirmation as Justice of the United States Supreme Court.

My name is Geoffrey C. Hazard, Jr. I am Professor of Law, Yale University, but speak only in my own personal capacity. My fields of special interest are civil procedure and professional ethics and I have written in various other fields, including the function of courts in formulating the law. I am a member of the bar of Connecticut and of California and have been actively engaged in law reform activities through the organized bar, as well as having taught in law schools for nearly 30 years.

I have known Judge Bork for 17 years, since my coming to Yale in 1970. Our acquaintance has been interrupted by his service in Washington and my assignments outside the Law School at this university. However, I am familar with much of his academic and professional writing and consider that we are personal friends as well as professional colleagues.

I wish to address three questions: Judge Bork's personal attributes; his role in the firing of Archibald Cox; and the relationship of his legal philosophy to the "mainstream."

First, there is no doubt that Judge Bork's intellectual and professional competence is of the highest order. Apart from whether the substance of his views on various legal matters is in the "mainstream," the strength and coherence of his powers of analysis and exposition cannot be seriously questioned. Furthermore, there can be no question of his personal and professional

integrity. In my opinion his moral sensitivity, his decency to others, and his honesty about himself and about the world are unimpeachable.

Second, there seems to me no basis for criticizing his conduct in firing Archibald Cox. As an elementary matter, had he refused to carry out President Nixon's order, someone else would have done so. This would not have been simply because some craven subordinate can be found to do dirty work but because, as the situation stood, President Nixon had a plain legal right to fire Cox. Indeed, it was because the President had that right, and chose to invoke it, that political responsibility for the decision to fire Mr. Cox fell unmistakably on Mr. Nixon. Had Judge Bork as Acting Attorney General sought to interpose the exercise of his own discretion, the question of legal responsibility would have been confused, perhaps to the point where political responsibility could not clearly have been attributed to the President. It seems to me that Judge Bork's course of action thereby facilitated the assessment of Mr. Nixon's legal and political responsibility in the Watergate crisis. That was itself a distinct contribution to American Constitutional Law.

The third matter is whether Judge Bork's legal philosophy is in the "mainstream." The matter is intentionally put as one of contemporary legal history. I do not presume to state that Judge Bork ought to be confirmed, but speak only on a matter that is relevant to the decision which the Senate must make and of which I have knowledge.

The key issue in assessing whether Judge Bork's legal philosophy is in the "mainstream" is defining the breadth of the stream of serious critical thought about the work-product of the Supreme Court over the last 25 years, and where within that stream to locate the Supreme Court decisions and Judge Bork's views about them. If the "mainstream" is the course of Supreme Court decisions themselves, then any legal philosophy separated from that course is necessarily outside the "mainstream." The criticism of Judge Bork's views seems to come down to such a definition.

Yet this definition is too narrow, both as a matter of Constitutional principle and as a matter of fact. As a matter of Constitutional principle, defining the "mainstream" as general concurrence with the Supreme Court's actual course in controversial decisions in the immediate past is an unduly restrictive definition. Using that definition would have disqualified Taney (who succeeded John Marshall), Holmes (who was an iconoclast), Brandeis (who was regarded as a radical), Black (who was regarded as a New Deal politician), and perhaps Thurgood Marshall.

As a matter of contemporary fact, the Supreme Court's course of decisions in the immediate past is regarded by many critics as passive and too conservative, as well as its being regarded by others as activist and radical. Critics holding the opinion that the Supreme Court is too conservative have said that its rulings should have gone much further in such matters as abortion, affirmative action, equal protection, rights of due process against the government, and so on. Yet these critics evidently regard themselves as responsible public citizens and serious academics and professionals, and so regard themselves as part of the "mainstream." On this basis, the "mainstream" must be taken to be, not the recent course of the Supreme Court as such, but the broad range of serious public and academic discourse about the Supreme Court and its role in American society, from all responsible points of view.

If the "mainstream" is defined in these terms, then in my opinon Judge Bork's philosophy is clearly within it. His philosophy responsibly addresses a set of questions that have been very much in issue over the last 25 years, and which are still in issue. Indeed, these questions have been in issue ever since the early days of the Republic. They are: What should be the fundamental law of the country (that is, the substantive issue), and how far should the judiciary have latitude in formulating that law (that is, the question of the court's institutional competence or jurisdiction).

The criticism of Judge Bork's views is premised on particular answers to both these questions. First, it is asserted that

the pattern of Supreme Court decisions as they have come down in the last twenty-five years is essentially correct, except perhaps that the decisions may not have gone far enough in matters such as restricting the death penalty, requiring trial-type hearings in transactions with the government, affirmative action, etc. Second, it is asserted that the Supreme Court indeed has institutional competence to formulate the law in these and other matters it has addressed. As to the second issue, i.e., institutional competence of the courts, sometimes the proposition is that the courts, particularly the Supreme Court, properly can determine these matters when the legislative branch, state or federal, has not acted; sometimes, as in issues concerning the death penalty and abortion, the proposition is that the Supreme Court, in formulating what the law shall be, properly can supersede the legislative branch.

These answers--that what the Supreme Court has done these last twenty-five years in the main has been substantively correct and institutionally appropriate--are themselves political and Constitutional judgments. As such, they remain debatable in their own terms. Moreover, they entail profoundly disputable assessments of whether the specific issues were properly resolved and whether the course as a whole has been as it should be. The specific decisions that comprise the Supreme Court's course in the last 25 years each involved legal arguments that at the time were open on both sides. Otherwise, the Court would not have had to make the decisions. Moreover, when these decisions were made, many of them were the subject of intense and cogent criticism on grounds of both substance and institutional appropriateness, by scholars and professionals of recognized standing. In the estimate of many observers, many of the specific decisions remain dubious on one or both grounds.

Judge Bork's legal philosophy is the product, which has evolved over time, of his participation in this process of scholarly and professional debate. His views along the way were shared and voiced by many other responsible academics and professionals. In my estimate, his position at any given point may

have been closer to the "mainstream" of opinion within the legal profession, if not within the legal academic community, than was the position of the Supreme Court. This does not prove that he was right or that the opinion of the legal profession is the relevant standard. It simply indicates that his positions were not at radical variance with those widely shared by others having informed knowledge of the law.

Furthermore, in long run perspective the concerns that animated Judge Bork's legal philosophy may have more portent than is usually acknowledged. The essence of this concern is that, although the substantive formulations adopted by the courts may accord with higher standards of justice than can be secured through the legislature, such formulations lack the sanction of direct public approval. Specifically, for example, the death penalty probably is regarded as abhorrent by most members of the college-educated middle class, who on the whole would approve its abolition. Yet the verdict of state legislatures, which are the legally constituted mechanism for legislating, is that the public as a whole in many parts of the country does not share this view. The same might be said of the exclusionary rule as applied to the drug trade, of the rules now governing pornography, of the rules governing abortion, and of certain of the rules concerning affirmative action.

The cumulative effects of judicial initiative in formulating the law in these and other respects are difficult to assess. Every responsible analyst of the law recognizes that there are interests that should be protected by the judiciary against the dictates of the legislative branch. The question is which of these interests warrant such protection, and how far. Hence, there are important gains in giving judicial protection to legal interests that the legislatures does not adequately heed. On the whole, these gains are worth the political and constitutional price, which is why the Supreme Court remains the vital institution that it is. But the gains certainly do not come without a price.

The price is the cumulative effect on the consciousness of

those who are not benefitted by the courts' law and who do not support that law on the merits. Many such people regard the courts' law of the last 25 years as the product of a mechanism they do not understand and cannot control, and which has come about, as they see it, through the transformation of judges into legislators with life-time tenure. Anyone who seriously questions that such a price has been incurred does not seem to me to be in touch with ordinary public opinion. If such a price has indeed been paid, then it has been an open constitutional and political question these 25 years whether, decision by decision, what is achieved in return is worth it.

Since that question is and has been an open question, then Judge Bork had the right as a professional in the law, and the duty in his vocation as an academic critic, to address it. His answers are not necessarily the ones I would have given, but they were intellectually honest and socially responsible, and he could be right. They were and are answers that many responsible people hold, including ones who may be reluctant to express them. In any event, it seems to me that his offering these answers to those questions was as much a part of the constitutional "mainstream" as the decisions to which he was responding.

Sincerely,

Geoffrey C. Hazard, Jr.

GCH:rj

THE NOMINATION OF ROBERT H. BORK TO THE UNITED STATES SUPREME COURT: TESTIMONY ON BEHALF OF THE HISPANIC NATIONAL BAR ASSOCIATION BEFORE THE SENATE JUDICIARY COMMITTEE

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HNBA JUDICIARY COMMITTEE, CHAIR
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Mr. Chairman and Members of the Committee:

My name is John Martinez. I am a graduate of Occidental College and the Columbia University School of Law and am presently an associate professor of law at the University of Utah College of Law in Salt Lake City, Utah. I am a former state president of the La Raza Lawyers Association of California, where I was instrumental in formulating and implementing procedures for evaluating the qualifications of lawyers and judges for the bench throughout the state. I presently chair the Judiciary Committee of the Hispanic National Bar Association, a capacity in which I was called upon to study judge Robert H. Bork's qualifications to be a justice on the United States Supreme Court and to formulate a position paper for the organization on his nomination. My position paper has been adopted by the HNBA's executive board as that of the organization.

A brief synopsis of our position on the Bork nomination begins with the rather unsurprising notion that conflicting interests are intrinsic to our pluralistic society. Moreover, we all would also probably agree that the magnificence of our federal Constitution lies primarily in the fact that it simultaneously embodies the tensions generated by those conflicts and also contains the framework for their accommodation. In order to grapple with these tensions within the framework established by the Constitution, a qualified judge must have a deep capacity for self-reflection, respect for the moral values underlying the law and a keen sense of open-minded evaluation of changing reality. In philosophical terms, it could be said that a reflectively-developed jurisprudence is indispensable to the Constitutional interpretive task. Judge Bork has no such jurisprudence. Instead, as we will demonstrate in the remainder of our presentation, he distorts the underlying values of the law and reality to fit within his ideological set of preferences. Worse, he apparently does so without being aware of it. For these reasons, we conclude that Judge Bork is unqualified to serve on the United States Supreme Court and urge the Senate to refuse to confirm his nomination.

Introduction

The urgency with which we press our views regarding Judge Bork can perhaps be better appreciated with a fuller understanding of the essential characteristics of our community. Like the American population generally, we hold dramatically diverse political views. We include radical Marxists at one end of the political spectrum and fervent anti-communists on the other. We find common ground most readily, however, in the preservation of the pluralistic ideals upon which this nation stands; our own diversity of interests, in a sense, forces us to value the protection of a broad array of views most dearly.

Like most other Americans, our politics are middle-of-the-road and our views on government are paradoxical. We want government to leave us alone and we want it to stop others from bothering us; we want it to stay out of our private lives and we want it to care for us when we cannot help ourselves; we want protection from criminals and we want protection from the police; we want local, accessible government and we want federal protection from local governmental tyranny.

Our evaluation of Judge Bork is therefore premised not on whether his politics might be simplistically described as "conservative" or "liberal" or his judicial philosophy boiled down to "judicial restraint" or "activist". Facile labels are not the things that matter. We agree, by and large, with the observations of Professor Laurence H. Tribe of the Harvard Law School that whether a judge adheres to an "original intent" philosophy or a more expansive theory of the judicial role matters far less than might appear.[1]

What matters is how seriously a judge takes the task of accommodating competing demands inherent in our pluralistic society in light of the broad moral goals underlying our system of government and law. Not only will different groups in society make conflicting demands of government but, moreover, as our own Hispanic community exemplifies, members of the same group may have different views about the same thing.

As every mature attorney knows, the tension generated by the competing demands of our nation's citizenry is embodied in prior decisions of the Supreme Court, in statutes passed by Congress and state legislatures, and, ultimately, in the federal Constitution. Thus, no judge who will not---or cannot---take seriously the enterprise of reconciling competing demands can be regarded as qualified. At that profoundly fundamental level, we find Judge Bork wanting. Accordingly, we find him unqualified to be a Justice of the United States Supreme Court.

I. Role of the Senate in Supreme Court Appointments

The rejection of Judge Bork's nomination would be fully consistent with the role of the Senate in judicial appointments. Historically, the Senate's role in Supreme Court appointments has consisted of more than simply rubber-stamping the President's nominations. After all, it was the Senate that defeated President Roosevelt's court-packing plan by refusing to confirm his nominees. Yet the Senate has a greater responsibility than merely to act as a brake on overly-ambitious presidents, however. As Professor Ronald Dworkin has written, the Senate's role surely

1. Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 22 Harv. C.R.-C.L. L. Rev. 95 (1987).

goes "beyond insuring that a nominee is not a crook or a fool".[2]

The Senate must exercise the power to confirm or deny the president's nominees in order to preserve the institutional integrity of the Senate in the confirmation process and to maintain the institutional integrity of the United States Supreme Court as a living component of our social framework. The Supreme Court's institutional role is to arbitrate the myriad competing demands in our society: of individuals against society, of federal against state governments, of one branch of the federal government against another, of the wealthy against the poor, of one region of the country against another.

If a Supreme Court justice cannot---or will not---engage in serious and open consideration of the values, demands and principles at play in the cases that come before the Court, then not only is the Court prevented from properly administering the law in individual cases, but its institutional legitimacy is profoundly compromised. Judge Bork would be such a justice and should therefore be denied confirmation.

II. Judge Bork: A Judge Without a Judicial Philosophy

We have no quarrel with Judge Bork's qualifications as an advocate, as a scholar or even as a judge on an intermediate court of appeals. Our concerns are with far deeper shortcomings that render him unqualified to sit on our nation's highest court.

A. Ability as an Advocate

There is no question that Judge Bork is an eminently capable advocate. His experience as a practitioner amply attests to his ability to analyze appellate decisions and other authoritative sources and to arrange them into a coherent pattern in support of a particular result.

B. Qualifications to be a Supreme Court Justice

The interpretive mission of the Supreme Court requires far more than rote advocacy skills, however. A Supreme Court Justice must have a mature jurisprudential philosophy that will lend predictability and stability to decisionmaking.[3] As Professor Tribe has suggested, a "meta-constitutional" theory is necessary

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2. R. Dworkin, The Bork Nomination, N. Y. Rev. of Books, Aug. 13, 1987, at 3.

3. For an instructive discussion, see Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987).

for resolving disputes at that level.[4]

And these are not purely academic disputes. For example, whether the Tenth Amendment prohibits Congress from regulating the wages and hours of state employees is a question of intense practical importance, and the Court has wavered on that issue several times in recent history.[5] The content of the Ninth Amendment, which provides that "[the] enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[6] is another matter of critical practical significance. That provision may determine such far-ranging issues as whether people have a right to decently fulfilling employment[7] and whether there is a right to engage in consensual, noncommercial, nonviolent adult intimacies in the privacy of a bedroom, free of governmental regulation.[8]

In sharp contrast, Judge Bork does not decide issues, he simply chooses a side. Instead of grappling with the conflicts and profound social consequences intrinsic to decisionmaking at the United States Supreme Court level, he simply announces a result. The results of his decisionmaking, therefore, are controlled by factors external to the choice to be made. This creates the ever-present danger of political opportunism in place of principled decisionmaking.

These deeply troubling characteristics are amply demonstrated by his own conflicting statements over the years.

1. Professor Bork, Arguing for Broad Judicial Discretion in Constitutional Interpretation

While still a professor of law at Yale, Judge Bork

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4. Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 22 Harv. C.R.-C.L. L. Rev. 95 (1987).

5. The Tenth Amendment provides that, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people". U.S. Const. amend X. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (setting out the series of overrulings).

6. U.S. Const. amend. IX.

7. See Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 22 Harv. C.R.-C.L. L. Rev. 95 (1987) (concluding they do not).

8. Id. (concluding there is such a right); but see Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (concluding there is not).

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demonstrated a deep appreciation of the complexities of the Constitutional interpretive task when he said:

> The test of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them. The First Amendment is a prime example. ... To apply the amendment, a judge must bring to the text principles, judgments and intuitions not to be found in bare words.
>
> When we turn to the equal protection clause of the Fourteenth Amendment ... we know the clause was meant to be important, [but] the words tell the judge very little.
>
> History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted and ratified the great clauses. The record is incomplete, the men involved often had vague or even conflicting intentions, and no one foresaw, or could have foreseen, the disputes that changing social conditions and outlooks would bring before the court ....[9]
>
> A desire for some legitimate form of judicial activism is inherent in a tradition that can be called "Madisonian". We continue to believe that there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumed that in wide areas of life, a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes that there are some aspects of life a majority should not control, that coercion in such matters is tyranny, a violation of the individual's rights. Clearly the definition of natural rights cannot be left to either the majority or the minority. In the popular understanding upon which the power of the Supreme Court rests, it is precisely the function of the court to resolve the dilemma by giving content to the concept of natural rights in case-by-case interpretation of the Constitution. This requires the court to have, and to demonstrate the validity of, a theory of natural rights...
>
> Legitimate activism requires, first of all, a warrant for the court to move beyond the limited range of substantive rights that can be derived from traditional sources of constitutional law. The case for locating this warrant in

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9. Quoted in P. Kurland, Bork: The transformation of a conservative constitutionalist, Chicago Tribune, Aug. 18, 1987, sec. 1.

> the long-ignored 9th Amendment was persuasively argued by Justice Arthur J. Goldberg in a concurring opinion in Griswold v. Connecticut [the decision invalidating Connecticut's anticontraception law on grounds of the right to privacy].... This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least in major part, a task for the Supreme Court....[10]

2. Professor Bork, Arguing for a Greatly Restricted Judicial Role in Constitutional Interpretation

By 1971, however, his views were almost exactly opposite. In an article in the Indiana Law Journal, he concluded that:

> the only course for a principled Court is to let the majority have its way ... [unless the matter] is covered specifically or by obvious implication in the Constitution.[11]

Among other things, he had decided that the Constitution did not prohibit racially restrictive covenants, sterilization of chicken thieves, poll taxes or state laws prohibiting illegitimate, but not legitimate, children from suing for the wrongful death of their parents.[12]

3. Solicitor General Candidate Bork, Retracting Most of the Views Set Out in the 1971 Article

When he was questioned by the Senate Judiciary Committee in confirmation proceedings for the position of Solicitor General, however, he disavowed the 1971 article in saying:

> I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. ... [I]t seems to me I was on the wrong tack altogether.[13]

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10. Id. at col. 6.

11. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 10 (1971).

12. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

13. Statement of Robert H. Bork, Nominee to be Solicitor General of the United States Before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 5, 14 (1973). Although this statement was in response to Senator Tunney's questions about Judge Bork's then-current views on the Civil Rights Act, it seems

4. Circuit Judge Bork, Again Adopting a Restrictive Role for the Supreme Court With Respect to Civil Liberties

More recently, in what was referred to by his fellow judges as a gratuitous "general spring cleaning of constitutional law"[14] and, not so kindly, by the New Yorker Magazine as a job application for a Supreme Court appointment,[15] Judge Bork had once more swung toward strict Constitutional interpretation:

> Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.[16]

As if to make his personal views crystal-clear, he added in a footnote:

> It may be only candid to say at this point that the author

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reasonable to infer that the disavowal applied to the entire article. Earlier in the same hearing he had begun to distance himself from the article as a whole, asserting that its foundation, and hence the conclusions, should instead be attributed to Professor Wechsler:

> The article ... is explicitly a tentative and rather theoretical attempt to deal with the problem, and it starts off with an attempt to pick up Professor Wechsler's concept of neutral principles and see what can be done with that concept. At the end of the article I point out that I think these are conclusions that are required by that idea of neutral principles, but that I am not sure about the whole subject.

Id. at 12.

14. Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984) (Robinson, J., dissenting on denial of rehearing).

15. The New Yorker, The Talk of the Town section, Aug. 3, 1987.

16. Dronenburg v. Zech, 741 F.2d 1388, 1396 (D.C. Cir. 1984).

> of this opinion, when in academic life, expressed the view that no court should create new constitutional rights; that is, rights must be fairly derived by standard modes of legal interpretation from the text, structure and history of the Constitution.[17]

Under the "standard modes of legal interpretation" he described in the Indiana Law Journal article, only expressly guaranteed or necessarily implied individual rights merit constitutional protection.[18]

III. Conclusion

What are we to conclude about Judge Bork's qualifications? Unsurprisingly, his record has been subjected to exacting scrutiny of late, and opinions about his confirmation vary widely.[19] This may only indicate, however, that everyone is interested, but that nobody is an expert. After all have had their say, therefore, each Senator must come to an individual conclusion.

After reviewing Judge Bork's record, representative portions of which we have described, the Hispanic National Bar Association agrees with Professor Dworkin's conclusion that:

> Perhaps Bork's convictions did shift ... dramatically over time. But it is hard to resist a less attractive conclusion: that his principles adjust themselves to the prejudices of the right, however inconsistent these might be.[20]

Our concern with Judge Bork is not that he adjusts his views to fit the prejudices of the right but that he adjusts his views to fit any prejudices at all. That is not an adequate intellectual heritage to bring to the Supreme Court.

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17. Id. at 1396 n.5.

18. See Bork, supra note 12 and accompanying text.

19. See e.g., R. Adler, Bork's new image and Rehnquist's new book: the clear and present danger, Coup at the Court, The New Republic, Sept. 14 & 21, 1987, at 37; A. Neal, Robert Bork, Advocate of Judicial Restraint, A.B.A. J., Sept. 1, 1987, at 82; P. Kurland, Bork: The transformation of a conservative constitutionalist, Chicago Tribune, Aug. 18, 1987, sec. 1; R. Dworkin, The Bork Nomination, N. Y. Rev. of Books, Aug. 13, 1987, at 3; The New Yorker, The Talk of the Town section, Aug. 3, 1987.

20. R. Dworkin, The Bork Nomination, N.Y. Rev. of Books, Aug. 13, 1987, at 3.

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October 3, 1987

Senator Edward Kennedy
Senate Committee on the Judiciary
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

As you requested, I have reviewed the record concerning Judge Robert Bork's role in Guy Vander Jagt, et al. v. Thomas O'Neill, Jr., 669 F.2d 1166 (D.C. Cir. 1983). The history of the case appears in internal memoranda of the Court of Appeals for the District of Columbia Circuit, together with letters to Chairman Joseph Biden from Judge James F. Gordon, Senior United States District Judge, sitting by assignment on the panel hearing the Vander Jagt case, and from Judge Bork. Then active Circuit Judge Roger Robb presided over the 3-judge panel. Judge Bork, a newly seated member of the District of Columbia Circuit, was the third judge.

This letter is divided into two parts: a summary of the record and my opinion. In giving my views, I rely upon my trial and appellate experience as a judge which include fourteen years on three different appellate courts, state and federal. I have studied, written and lectured on appellate court systems and procedure for 20 years, and I have taught seminars for federal and state appellate judges.

A. Summary of the Record

In Vander Jagt, fourteen Republican members of the House sued the House Democratic leadership, contending that the Democrats systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionally due. The District Court dismissed the complaint, holding that the action was barred by the Speech or Debate Clause and by the provision of the Constitution which confers upon the House the power 'to determine the Rules of its proceedings." Art. I, §5, cl. 2. The Vander Jagt plaintiffs argued that the means of apportioning the seats in question deprived them of due process and equal protection rights, as well as the First Amendment rights of association and free speech.

1. The case was orally argued on March 19, 1982. In a conference memorandum prepared by Judge Robb to Judges Bork and Gordon on the same date, Judge Robb stated:

> "At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume

that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons."

2. Judge Gordon, in his letter dated August 24, 1987, described the conference discussion that anteceded Judge Robb's conference memorandum. He states:

> "All three of us were in instant agreement that the relief be denied appellants Vander Jagt. Judge Robb directed our attention to the fact that he had written the prior opinion of the D.C. Circuit in Riegle v. Federal Open Market Committee, 656 F.2d 873 (1981), which he, Judge Robb, considered to be the law of the Circuit. I agreed.
>
> After discussion, it was agreed by all and ordered by Judge Robb that Judge Bork would write the unanimous opinion of the Court, denying relief to the appellant Vander Jagt on the ground of 'remedial discretion,' relying on the Riegle case....
>
> As we were departing the room at the end of our conference, I recall Judge Bork alluding to the 'lack of standing doctrine,' to which both Robb and I, particularly Robb, took immediate vigorous exception and reiterated our views that the Riegle case controlled and was the opinion of the majority of the court.
>
> There is no way Judge Bork could have misunderstood Robbs' and my position."

In his letter dated October 1, 1987, Judge Bork recalls the events at conference differently. Judge Bork does not remember that Riegle was discussed. Judge Robb wrote the opinion for the Court in the Riegle case. Riegle specifically rejected dismissal of the case for lack of congressional standing; instead, the court denied relief exercising its discretionary power to withhold relief where separation-of-powers concerns dictated that result. The court adopted the reasoning of Judge Carl McGowan, a distinguished member of the same court, who had expressed his views in an article "Congressmen in Court: The New Plaintiffs," 15 Ga. L. Rev. 241 (1981).

3. On May 31, 1982, Judge Robb took senior status, and Judge Bork, as the only active judge remaining on the panel, assumed Judge Robb's role as presiding judge of the panel. As the new presiding judge of the panel, Judge Bork did not inform Judge Gordon about the change in the composition of the panel.

4. Judge Bork neither circulated a draft opinion nor any memorandum about the case until September 17, 1982. On that date, he sent his draft opinion to Judges Robb and Gordon, with a cover memorandum of one sentence: "Attached is my proposed opinion in the above-mentioned case for your review and comment." The draft disposed of the case on denial of congressional standing, a rationale that had been rejected at conference when Judge Bork had initially pressed that point.

5. Judge Gordon telephoned Judge Robb to ascertain what had happened. Judge Gordon said that he was informed that Judge Robb was in the hospital suffering from cancer and, for the first time, he learned that Judge Robb had taken senior status. According to Judge Gordon, he received a call from an unidentified judge of the District of Columbia Circuit who later reported to him that Judge Robb "was upset by the development in

the Vander Jagt case and instructed [Judge Gordon] on Judge Robbs' behalf, to immediately prepare for the two of us a majority opinion on the basis of 'remedial discretion' and to advise Judge Bork to that effect. [Judge Gordon] was admonished to accomplish this task so that our final order could be issued before the end of the calendar year 1982."

6. On September 24, 1982, Judge Bork wrote Judge Gordon a letter, apologizing for his failure to notify him "in advance that I had changed the rationale in the Vander Jagt case to one of lack of standing." Judge Bork stated that after he "started on the opinion," it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. He added that the standing rationale "was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate."

7. On October 5, 1982, Judge Robb wrote a memorandum to Judges Bork and Gordon stating that he was "surprised" to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Judge Robb continued:

> "Although I agree with the result I regret that I cannot concur in the opinion. I would apply the Riegle theory to this case. The Valley Forge case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the Riegle theory in a congressional plaintiff context.
>
> ... I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.
>
> If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately."

8. On October 8, 1982, Judge Bork wrote a memorandum to Judges Robb and Gordon in which he stated that he thought it was "advisable to set out my current thoughts about the case." He reiterated that he thought it was "easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month." Judge Bork also stated:

> "Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curium opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcuseably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed."

He presented a preview of his then current thinking about his views to be presented in a concurring opinion. Judge Bork added:

> "[I] welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence...."

9. The majority opinion was reassigned to Judge Gordon. The majority opinion was not filed until February 4, 1983, because it was delayed awaiting the concurring opinion from Judge Bork. Both opinions were filed February 4, 1983.

10. The only reported en banc proceeding in the District of Columbia Circuit concerning standing, political questions and separation of powers during the period March-October, 1982 is Murray v. Angela Marie Buchanan, Treasurer of the United States, 674 F.2d 14 (D.C. Cir. 1981). Petitions for rehearing en banc were granted, October 27, 1982, and the case was decided en banc October 28, 1983, 720 F.2d 689.[1] The plaintiffs were a group of atheists who brought a taxpayers' action seeking to enjoin the Treasurer of the United States and others from expending or receiving funds under statutes authorizing payment of salaries and certain expenses for the Chaplains of the Senate and the House of Representatives. Plaintiffs argued that the statutes were unconstitutional under the Establishment Clause of the First Amendment. The District Court had dismissed the case on the grounds that the plaintiffs lacked standing and that the claim was nonjusticiable because it presented a political question. The panel, one judge dissenting, reversed on the standing issue and remanded the case for further proceedings. On en banc rehearing, the case was ordered dismissed because, in the interim, the Supreme Court had decided Marsh v. Chambers, ___ U.S. ___ [51 U.S.L.W. 5162] (1983) holding that the practice of opening each legislative day with a prayer by the Chaplain paid by the State does not violate the Establishment Clause of the First Amendment. The en banc court therefore dismissed the case for failure to raise a substantial constitutional question.

B. Commentary

The panel was aware that actions by members of Congress against one another always present sensitive issues of public importance. Judge Robb, sitting with Judges Edwards and Penn, had struggled with the thorny issues of congressional standing in the Riegle case, and, at the time Vander Jagt was argued, Riegle was the law of the Circuit.

When Judge Bork volunteered to write the opinion for the panel after his colleagues rejected his standing argument in conference, did he intend to set aside his strongly held personal views against congressional standing to try to write an opinion following Riegle, or, according to Judge Bork's recollection on the grounds that the action was foreclosed by the political question doctrine or the Speech and Debate Clause of the Constitution? Or did he then intend to draft a standing opinion hoping to persuade his colleagues that they had wrongly rejected his oral argument and that his views on standing should become the law of the Circuit?

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[1] The original panel was Judge Bazelon, Senior Circuit Judge, Judges MacKinnon and Ginsberg, Circuit Judges.

Judge Bork, as a new judge, had no opinon backlog to prevent his turning immediate attention to this opinion. Even allowing for the interruptions in opinion writing caused by chambers work in preparing for the next calendar and disposing of motions and administrative tasks, the writing of an opinion in the case should not have consumed more than two weeks. No reason appears from the record to explain why no draft appeared within 30 days from the conference. Judge Bork circulated nothing for six months. The draft he then circulated was a renewal of his standing arguments. When his standing arguments were again firmly rejected, he insisted upon writing especially a concurring opinion further elaborating his views on standing. As Judge Bork stated in his specially concurring opinion:

> "It seems necessary to say a word about my colleagues' rationale, because the difference between their position and my own rests on more than a reading of precedent. It reflects a disagreement about the role of the federal courts in our government.
>
> At the level of case law interpretation, I have sufficiently expressed my belief that, even at the time it was decided, Riegel's reasoning proceeded from a false premise about the Supreme Court's view of standing and that the invalidity of that premise was once more demonstrated by the Supreme Court's Valley Forge decision...."

Judge Bork's continued insistence that he express his views in a judicial opinion delayed disposition of the case until after the new Congress was seated. The delay threatened to moot the entire controversy.

Judge Bork testified before this Committee, and he has reiterated his recollection in his recent letter to the Committee, that he tried to write an opinion in conformity with conference disposition and that it would not write that way. It is not rare that a judge assigned to write an opinion for a panel discovers that the opinion will not write that way when, after intense examination of the record in the course of preparing an opinion, the judge discovers that an essential element of proof was missing, or a critical procedural step was absent, or that an issue of law has emerged that was not earlier discussed and that will affect disposition. When the writing judge runs into that kind of snag, the ordinary course is to discuss the problem with one's colleagues in a personal meeting, a telephone conference, or in an explanatory memorandum, with or without an accompanying draft opinion.

The documented events in the Vander Jagt case are very unusual. Nothing new emerged after the conference. The standing issue had been raised, discussed, and rejected by a majority of the panel. Judge Bork never discussed the problem with Judge Gordon until after Judge Gordon protested Judge Bork's circulated draft. Judge Bork states that he had earlier discussed the issues with Judge Robb. Judge Robb did not recall that any such discussion took place. The record seems clear that Judge Bork did have a discussion with Judge Robb. Only two people could know what was discussed in their meeting. Judge Robb is dead. Is it likely that Judge Robb led Judge Bork to believe that he agreed with Judge Bork's standing analysis of the case? The record is plain that Judge Robb strongly disagreed with the standing argument at the time of conference, in his memorandum after he had received Judge Bork's draft opinion and in his earlier Riegle opinion.

Judge Bork would have disagreed strongly with the majority's standing decision in the Murray case. Nevertheless, it is difficult to see why the opinion in Vander Jagt should have been delayed awaiting en banc disposition of Murray. The considerations involved in deciding standing of taxpayers who challenged the constitutionality of a statute and those that

apply in deciding the standing of members of Congress to challenge the apportionment of congressional seats on committees are quite different.

The doubts that the record raises with respect to Judge Bork's memory of the events and his candor cannot be resolved on this record. Judge Bork knew that he was negligent when he failed to discuss with Judge Gordon his inability to write an opinion in accordance with conference disposition and in failing to notify him of the change in the composition of the panel caused by Judge Robb's taking senior status. More is involved, however, than a breach of judicial etiquette.

The history of this case should cause serious concern even if all credibility issues are resolved in Judge Bork's favor.

The deeply troubling aspect of the history is that Judge Bork displayed disregard for the rights of the litigants. The outcome of the case was forgone on the date of the conference. Yet Judge Bork's conduct caused delay in the disposition of the case for almost a year. Judge Bork, like Judge McGowan, could have expressed his own views at length in a law review article, without the constraints of the duties of an appellate judge. Instead, he insisted on propounding his own views and to criticise harshly the Riegle decision which was binding precedent in the Circuit.

The inference is inescapable that Judge Bork's determination to state his convictions on standing were more important to him than his duty as a judge to decide the case before him. Vander Jagt is not an isolated instance of such conduct. For example, in Barnes v. Kline, 759 F.2d 21, (D.C. Cir. 1985), vacated as moot sub. nom. Burke v. Barnes, ___ U.S. ___, 107, S.Ct. 734 (1987), Judge McGowan wrote the majority opinion holding that members of Congress, the Senate, the Speaker, and the bipartisan leadership of the House could challenge the President's exercise of a pocket veto. In dissent, Judge Bork insisted on writing dicta that went far beyond the bounds of the case. Judge Bork wrote: "We ought to renounce outright the whole notion of congressional standing." 759 F.2d at 41. Judge Bork stated that Judge McGowan's opinion was "absurd" (759 F.2d at 55), and that his own view was the only "conclusion ... possible." 759 F.2d at 55, 56. In Williams v. Berry, 708 F.2d 789 (D.C. Cir. 1983), the plaintiffs were homeless men who claimed that the District of Columbia was constitutionally required to provide them an opportunity to be heard before the District closed the shelter for the homeless. Judge Edwards, for the majority, held that the procedural protections that were constitutionally required had been given and that the scope of judicial review of a procedurally correct decision to end emergency shelter services was not ripe for decision. Judge Bork wrote a separate concurring opinion addressing constitutional issues that were not before the court and giving advance notice of what he would do in a future case. "Had there been a cross-appeal, I think it highly likely that no process would have been found due." 708 F.2d at 793. Another example is Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). The plaintiffs were survivors and representatives of survivors of persons who were killed in an armed attack on a civilian bus in Israel. The question was whether 28 U.S.C. §1350 applied to give the federal courts jurisdiction and created a private cause of action in the plaintiffs. A per curiam opinion stated that the action was properly dismissed, but Judges Bork, Edwards and Robb each filed separate opinions. Judge Bork was not content to decide the case before the court. He used the case as a vehicle to expound his opinion that the language of the statute referring to the "law of nations" should be read as its initial draftsmen might have intended, and not in terms of "modern assumptions." 726 F.2d at 813. He added that "in 1789 there was no concept of international human rights." Ibid. (In 1789, half of our states

accepted the concept that black human beings, like cattle, could be owned, bred, bought and sold.) An additional illustration is Crowley v. Shultz, 704 F.2d 1269 (D.C. Cir. 1983). The sole question presented was whether, under a particular savings clause, the State Department employees were entitled to a particular benefit. In his opinion for the Court, Judge Bork decided that they were not so entitled. However, Judge Bork was not content merely to decide the only question before the Court. He wrote a separate opinion concurring with himself, stating that even without the savings clause, the employees would not have been entitled to the benefit they sought. That performance is nothing short of extraordinary.

Not one of these opinions was necessary to dispose of the case. All of these separate opinions necessarily delayed disposition of the case. Judicial opinions are not supposed to be provocative classroom lectures, all points bulletins, or law review articles. Each of these acts reveals Judge Bork's lack of judicial restraint. Each vividly illustrates Judge Bork's deep regard for his own theories of law, and his lack of regard for the human beings whose rights are being adjudicated.

Sincerely,

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October 6, 1987

Senator Edward Kennedy
Senate Committee on the Judiciary
Russell Senate Office Building
Washington, D.C. 20510

In Re: Mr. Lloyd Cutler's Testimony
in the Confirmation hearings
concerning Judge Robert Bork

Dear Senator Kennedy:

The burden of Mr. Cutler's testimony before the Senate Committee on the Judiciary is that Judge Bork is a moderate conservative whose record on sensitive issues of constitutional law bring him within the mainstream of judicial thought and that his views are comparable to those of Justices Stewart, Harlan, Stevens, and Black. I do not doubt Mr. Cutler's good faith in expressing his opinion, but an objective view of the record does not sustain it.

Mr. Cutler has asked the Committee to infer that the design of a tapestry can be discerned from looking at a few threads. When the body of the published work of the Justices and of Judge Bork is examined, however, the visible patterns of their thoughts emerge, and they are in sharp contrast to those of Judge Bork.

To avoid unnecessarily burdening the Committee, which already has a voluminous record before it, I shall not readdress Judge Bork's highly individualistic, even idiosyncratic, opinions on antitrust laws, the proper functions of judicial opinions, or the intemperance with which he has expressed his ideas about the opinions of his colleagues on the United States Court of Appeals and those of the Supreme Court with which he disagrees. I shall limit my brief commentary to his publicly stated concepts of liberty, the constitutional right of privacy, equal protection, freedom of expression and access to the courts.

A. Liberty and Privacy. Judge Bork's philosophy, even as modified in his testimony before this Committee, has led him to take an extremely limited view of the concept of liberty stated in the Constitution. Whether his view is advanced using the rubric of "originalism," or "interpretist doctrine," he has sought to confine the liberty which remains to the people to those liberties expressly stated in the Constitution as understood by the draftsmen at the time the provisions were adopted. The mainstream of judicial thought, beginning with Chief Justice Marshall in 1810, is to the contrary: The people retained their fundamental liberty rights, whether or not

specifically described in the Constitution, and they ceded only limited powers to the government. That constitutional principle is underlined by the Ninth Amendment stating: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," a provision that Judge Bork has jettisoned from the Constitution.

Mr. Cutler has sought to support his opinion that Judge Bork is a moderate conservative on liberty issues by selective citation of certain cases in which one or more of the Justices with whom he wants to compare Judge Bork's views favorably, have dissented in cases implicating rights that Judge Bork has insisted do not exist. In the first place, none of the Justices with whom Mr. Cutler has associated Judge Bork has expressed the view that the rights preserved to the people were only those expressly articulated in the Constitution. In the second, a comparison of the views of Judge Bork on liberty and privacy and those of the Justices to whom Mr. Cutler has referred, reveal far more divergence than convergence with Judge Bork.

Thus, for example, Mr. Cutler suggested that Justice Black agreed with Judge Bork that no substantive right of "liberty" existed beyond those expressly stated in the Bill of Rights. Mr. Cutler's conclusions are not supported by the record of Justice Black. Thus, for example, Justice Black joined the "liberty"-based opinions in Loving v. Virginia, 388 U.S. 1 (1967); Bolling v. Sharpe, 347 U.S. 497 (1954), and Skinner v. Oklahoma, 316 U.S. 535 (1942). Mr. Cutler stated that Judge Bork's only criticism of Skinner, in which the issue was the constitutionality of government sterilization of criminals, was based on a statutory classification discriminating between robbers and embezzlers. Mr. Cutler is mistaken. In Judge Bork's 1982 Yale Federalists Society speech, he said that "the right of procreation is another-made up constitutional right. Neither it [nor the right to privacy] are to be found anywhere in the Constitution." Indeed, in Judge Bork's testimony before this Committee, he reaffirmed his disagreement with the basic "liberty" underpinnings of Skinner. He added that the classification drawn by Oklahoma might have run afoul of the ban on racial discrimination if that issue had been raised and argued.

In Mr. Cutler's effort to put Judge Bork into Justice Stewart's camp, he relied on Justice Stewart's initial dissenting opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), and he characterized Justice Stewart's concurrence in Roe v. Wade, 410 U.S. 113 (1973), as a reluctant bow "to the majority precedent set over his dissent in Griswold seven years earlier." Instead, Justice Stewart's opinion in Roe was a wholehearted embrace of the principle that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes concepts of "liberty" not specifically named. Thus, Justice Stewart in Roe stated that he "accepts" Griswold as "one in a long line of [pre-1983] cases decided under the doctrine of substantive due process," 410 U.S. at 168. He thereafter affirmatively defended the view that, although the "Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life," the "'liberty'" protected by the Due Process Cause of the Fourteenth Amendment covers more than those freedoms explicity named in the Bill of Rights. Thereafter, Justice Stewart quoted favorably from Justice Harlan's great dissent in Poe v. Ullman, see 410 U.S. at 169, and, he added that the Court in Roe "[c]learly ... is correct." Id. at 170. In Poe, Justice Harlan said:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points picked out in terms of the taking of property; the right to keep and bear arms; the freedom from unreasonable searches and seizures;

> and so on. It is a rational continuum, which, broadly speaking, includes a freedom from all substantially arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particular certain scrutiny of the state needs asserted to justify their abridgement." 410 U.S. at 169.

Justice Harlan and Judge Bork are poles apart on their understanding of the breadth and meaning of the Constitution and of those rights that were preserved to the people and not delegated to the State.

The difficulty with Mr. Cutler's comparisons of Judge Bork's views with that of the Justices he has cited is that he has mistaken a thread for the fabric. Individual justices did dissent in some of the major cases involving liberty and the right of privacy at various times during the development of these areas of constitutional law. Some aspects of the reasoning in these cases have been criticised in dissenting opinions within the Court and in scholarly criticism. But these differences of view do not signal any acceptance of Judge Bork's originalist ideas, nor his wholesale rejection of even the existence of a body of intimate personal liberties protected by the constitutional right of privacy, or his dismissal of these bodies of law as illegitimate and unconstitutional. Judge Bork's views on these subjects are decidedly extreme.

Although members of the Supreme Court have disagreed with one another about the extent of the specific constitutional source of the protection of the right of privacy and its application to particular factual circumstances, the Court has developed a remarkable degree of consensus that the right of privacy is constitutionally protected. Justices Harlan and Frankfurter, to whom Mr. Cutler favorably compared Judge Bork, both accepted the privacy concept. Justice Harlan agreed with the majority in Griswold, and Justices Frankfurter and Harlan joined the majority opinion in Skinner. At least as recently as 1981, Judge Bork dismissed Skinner as "perhaps aberrational."[1]

B. Equal Protection. As the Committee is aware, Judge Bork has for many years taken an extremely narrow view of the Equal Protection Clause. Until his testimony before this Committee, he had frequently expressed his opinion that the clause did not apply to women. Mr. Cutler attempted to clothe Judge Bork in Justice Stevens' robes on the gender issue, after Judge Bork testified that he would now include women and apply to them a "reasonableness" test. That robe will not fit. Justice Stevens joined the opinions in Kirchberg v. Feenstar, 450 U.S. 455, 460 (1980) and Mississippi University for Women v. Hogan, 458 U.S. 718, 724-725 (1982), rejecting reasonable-basis review for gender cases and insisting on heightened scrutiny. Whatever may be the contours of Judge Bork's newly discovered reasonable basis test, nothing he said about it to the Committee suggests that his own views resemble Justice Stevens'. Justice Stevens' discussion favored reformulating a rationality test based on reasonableness assessed, not from the perspective of the current majority (as would Judge Bork), but from the perspective either of an "impartial lawmaker" or "a member of [the] class of persons" disadvantaged by the challenged law. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 454 (1985) (Stevens, J., joined by Burger, C.J., concurring). To equate Judge Bork's "reasonable basis" test with Justice Stevens' approach also fails because Justice Stevens concurred fully in Craig v. Boren, 429 U.S. 190, 211-14 (1976), but Judge Bork disavowed Craig, characterizing the decision as trivializing the Constitution.

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[1] The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97 Cong. 1st. Sess. 315 (1981).

Mr. Cutler has evoked Lochner v. New York, 198 U.S. 45 (1905), as an example of the unfortunate results that follow when the Supreme Court fails to yield to the congressional will in protecting employees from exploitation, and he has implied that Judge Bork's new philosophy will produce better results. The Lochner majority struck down a state statute limiting the hours of employment in bakeries to sixty hours per week, ten hours per day on the ground that the statute arbitrarily interferred with freedom of contract guaranteed by the Contract Clause and that freedom of contract could not be overriden by the state's power to protect public health, safety and general welfare. The case does not present simply a refusal of the majority of the court to accedeto legislative will; it was a bald attempt to write into the Constitution an economic theory that the Nation had decisively rejected, as Justice Holmes' vigorous dissent pointed out. Lochner scarcely supports an argument that Judge Bork's newly minted reasonable-basis test will produce better results in reducing the impact of invidious employment discrimination against women than the current heightened scrutiny standard. The history of legislation based on gender stereotypes that have been used to protect women right out of their jobs has not been encouraging. That is not to say that legislatures have not successfully enacted legislation that has improved the situation of women and minorities on a number of occasions.

Judge Bork's deference to the legislative will in protecting employees, including women, from hazards in the work place is, at the very least, suspect, in the light of his decision in Oil, Chemical & Atomic Workers International Union v. American Cyanamide Co., 741 F.2d 444 (D.C. Cir. 1984). The issue was whether a requirement that women could not work in certain branches of the company unless they first accepted sterilization was a violation of the Occupational Safety & Health Act. Chemicals in the plant injured foetuses. The company retained only those women in employment who accepted sterilization. The statute compels employers to furnish a place of work free from "recognized hazards" that might cause "serious physical harm." Judge Bork held that no statutory violation occurred because the kind of dangers that the women had in the work place did not fall within the "recognized hazards" that might cause "serious physical harm." Would Judge Bork have reached the same conclusion if men working in the plant exposed to the same chemicals, sterilized men, and the men were asked to choose between their employment and sterilization by the plant chemicals?

C. Freedom of Expression. Both to demonstrate Judge Bork's respect for freedom of speech and his supposed kinship with the views of Justice Stevens, Mr. Cutler lauded the specially concurring opinion of Judge Bork in Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984). Ollman, a political science professor of communist persuasion, aspired to become head of his department. Syndicated columnists, defendants Evans and Novak, published an article sharply critical of Professor Ollman's views and the actions of the administration of the university. The majority of the en banc court held that the writers' views were statements of opinion fully protected by the First Amendment and, therefore, Ollman could not successfully maintain his libel action. Judge Bork agreed with that result on a different ground: Ollman had thrust himself into the arena of political debate in campus politics, which spread into state politics as well. Then Judge Scalia dissented. Judge Bork's views in Ollman do not suggest that he took a more expansive view of the protection of freedom of expression in 1984 than he had at an earlier time. Judge Bork had long held the opinion that the maximum latitude should be allowed for freedom of expression in the political arena to promote robust political debate. (As the Committee knows, until his testimony, Judge Bork had earlier sought to confine the First Amendment guarantees to just such expression.) Judge Bork's years of experience in academia taught him how vigorous political debates are within academic politics;

moreover, while in academia, he had earlier espoused libertarian-socialist views, resembling Ollman's, which he later discarded. When Justice Stevens indicated that Judge Bork's views in Ollman were not dissimilar from his own in this case, one cannot reasonably assume that Justice Stevens agreed with Judge Bork's extremely narrow reading of the First Amendment in contexts other than political debate. And even in that arena, Judge Bork has acidly criticized the dissents of Justices Holmes and Brandeis in Abrams v. United States, 250 U.S. 616 (1919), and Gitlow v. New York, 268 U.S. 652 (1925). He also attacked Brandenburg v. Ohio, 395 U.S. 444 (1969), in which Justices Harlan, Stewart, White, Black and Douglas concurred;[2] and Hess v. Indiana, 414 U.S. 105 (1973) in which, among others, Justices Stewart, White, Blackmun and Powell concurred. Justice Stevens has not given the slightest indication that he agrees with Judge Bork's condemnation of these decisions.

D. Access to the Courts. Mr. Cutler's opinion that Judge Bork's views of standing are in the mainstream and comport with judicial restraint cannot be reconciled with Judge Bork's highly individualistic and selective decisions closing the doors of courts by mechanisms, including standing, to accomplish that result.

In Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984), housing developers alleged in action by the District Department of Housing and Community Development and actions by the District's Counsel on condominium conversions violated their Fifth Amendment rights. Judge Bork held that the federal court's doors were open to adjudicate the developers' claims to review decision-making by an executive branch of government. In contrast, in Williams v. Barry, 708 F.2d 789 (D.C. Cir. 1983), the issue was whether the homeless men, who were plaintiffs, had received the necessary procedural protections before the District decided to close a shelter for the homeless. Judge Bork, concurring specially in the majority's conclusion that procedural protections had been afforded, stated his views that the judiciary should not be permitted to review "political" decisions of the Executive Branch, and described a contrary position as "revolutionary." In Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot sub. nom. Burke v. Barnes, __ U.S. __, 107 S.Ct. 734 (1987), Judge Bork dissented from the majority opinion that held that members of Congress could challenge the President's exercise of a pocket veto. Judge Bork said: "We ought to renounce outright the whole notion of congressional standing." 759 F.2d at 41. He denounced the majority's contrary view as "absurd." Id. at 55. In Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984), survivors and relatives of persons killed during a parade when attacked by Klu Klux Klan and American Nazi Party members, sought the appointment of a Special Prosecutor, alleging that they believed members of the Federal Government had been involved with the attackers. When their request was denied, the plaintiffs sought mandamus against the Attorney General to commence a preliminary investigation, under 28 U.S.C. §592. In a per curiam opinion, the Court held that the District Court erred

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2 Justices Douglas and Black concurred specially urging broader protection for free expression than that encompassed by the "clear and present danger" test.

in granting partial summary judgment for the plaintiffs. Judge Bork set forth his views separately, arguing that the law enforcement power belonged exclusively to the Executive Branch and that the exercise of that power was beyond judicial review. In Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. 1987), a non-profit membership corporation assisting Haitian refugees, brought the action challenging the detention at sea by vessels of the United States. Judge Bork held that the action was barred because the plaintiff organization had no standing, despite the fact that the organization had aided or worked with 20,000 Haitians. Judge Bork's conclusion is in the teeth of the rule in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), which reached the opposite conclusion in a case upholding the right of an independent organization to sue a real estate company for interference with black housing.

Despite Mr. Cutler's earnest advocacy, Judge Bork can no more be fitted into the mainstream of constitutional philosophy than the Potomac could be fitted into a teacup.

Sincerely,

Shirley M. Hufstedler

SMH:sh

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

September 30, 1987

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510-6275

Dear Senator Biden:

On September 14, 1987, we transmitted to the Senate Judiciary Committee by letter to you, a statement in opposition to the confirmation of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court. We included with that statement the names of individual members of the Board of Trustees and others affiliated with local Lawyers' Committees who have endorsed the statement and an analysis of Judge Bork's record on civil rights and civil liberties issues. At that time we anticipated that we would have the opportunity to testify at the confirmation hearings but we have been informed by committee staff that it will not be possible to present oral testimony.

Enclosed are seventy copies of the testimony we had hoped to provide. We request that it be made part of the record to be considered by the full committee during its deliberations. Also enclosed is the statement in opposition to the confirmation of Judge Bork and a revised list of signatories. Ninety-six members of our Board of Trustees have signed the statement in their individual

capacity. (Appendix A, Part I). In addition, 214 lawyers affiliated with local Lawyers' Committees in six cities have joined the national members in expressing their opposition to the confirmation of Judge Bork. (Appendix A, Part II).

Very truly yours,

Conrad K. Harper
Co-Chair

Stuart J. Land
Co-Chair

cc: Honorable Strom Thurmond
Ranking Minority Member
Committee on the Judiciary
United States Senate

Written Testimony of Conrad K. Harper, for Individual Members of the Lawyers' Committee for Civil Rights Under Law, and Individual Members of Local Lawyers' Committees, Respecting the Nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States

Submitted to the Senate Committee on the Judiciary

September 29, 1987

Introduction

My name is Conrad Harper. Stuart Land, who is next to me, and I are co-chairmen of the Lawyers' Committee for Civil Rights Under Law, a national organization of lawyers, headquartered in Washington. We are committed to enforcing and broadening civil rights.

The Lawyers' Committee

We have submitted for the record a statement in opposition to the nomination of Judge Bork as an Associate Justice of the United States Supreme Court, on behalf of 96 members of the Board of Trustees of the Committee, including, as I shall note, many prominent lawyers and former high government officials. Our action has been joined by 214 members of our various local committees in major cities in the United States.

We took this action only after a thorough analysis of Judge Bork's writings. The results of this analysis are set forth in a 45-page memorandum which we have also submitted for the record. This analysis, prepared by volunteer private lawyers, constitutes our honest effort to analyze fairly Judge Bork's position on the Constitution and the role of the Supreme Court. From this analysis, it is clear to us that Judge Bork has embraced a judicial philosophy such that his nomination, as we said in the statement, "jeopardizes the civil rights and liberties long-enjoyed by all Americans."

The Lawyers' Committee has a unique history and a strong commitment to the rule of law, well within the traditional values of our profession. The Lawyers' Committee was organized in 1963 at the height of black protest demonstrations in Birmingham, Alabama. The motivating concern in its formation was the fact that lawyers in private practice, many of them in the South, were not providing legal assistance to civil rights workers, black and white, or to local citizens involved in nonviolent protests against racial discrimination. By mobilizing the resources of lawyers in private practice throughout the country, President Kennedy wanted the Bar itself to take a lead in solving our nation's civil rights problems. Throughout its history, the Lawyers' Committee has included

among its members, Republicans and Democrats, conservatives and liberals.

The 96 trustees who have signed the Lawyers' Committee statement opposing the confirmation of Judge Bork include distinguished practitioners and law professors from coast to coast. Several of them are leading lawyers in national law firms. Many of them have served in high governmental posts in Republican and Democratic administrations, and the signers include a former Attorney General, 1/ a former Secretary of State, 2/ a former Deputy Secretary of State, 3/ three former Assistant Attorneys General for Civil Rights, 4/ two former presidents of the American Bar Association, 5/ and two prominent law school deans. 6/

All of us, after reviewing Judge Bork's record of writings and speeches, concluded that he has repeatedly manifested strong opposition to many of the central principles of equal justice under law.

As a number of the members of the Judiciary Committee have already pointed out, constitutional law is not simply a matter of abstract philosophy; rather, it is law which deeply affects human beings. Our work over the last quarter century has given us crucial practical insights into civil rights issues, an insight which demonstrates why

Judge Bork's views are inappropriate for a nominee to the Supreme Court.

The James Case and Voting Rights

Thirteen years ago, I was a trial lawyer representing illiterate black voters in Mississippi. They were challenging the requirement that illiterate voters be assisted in casting their votes only by election officials, most of whom were white. 7/

At the trial, a black farmer, then well over sixty, testified that when he appeared at his polling place to vote in November 1971, the white election official jeered him, saying he could not even read yet he wanted to vote and run for office. I asked that farmer how long he had lived in Mississippi. He answered, "All my days." He had lived there all his life but, because of devices like literacy tests and poll taxes, he had not been able to vote. He secured the right to vote only because he was registered by federal examiners who had been appointed under the Voting Rights Act of 1965. The federal judge hearing the case ordered the election officials to permit illiterate voters to be assisted by persons of their choice.

The contrast between this real life experience and Judge Bork's constitutional theories is great. For decades, literacy tests were a primary device for disfranchising

black voters. Indeed, educated blacks were often disqualified while illiterate whites were deemed able to read and understand the state constitutions frequently used as literacy tests. 8/ Illiteracy does not mean unintelligence or inability to make reasoned political choices. The increasing predominance of electronic media in our political life assures that those unable to read or write nonetheless have wide access to relevant information for choice.

Judge Bork has condemned Oregon v. Mitchell 9/, the Supreme Court decision upholding the Congressional prohibition of all literacy tests, calling the decision "very bad, indeed pernicious, constitutional law." 10/ His views represent his deeply rooted opposition to many of the principles for which the Lawyers' Committee has worked.

A question which might fairly be asked is whether Judge Bork's views on voting present a disturbing paradox. A keystone of his advocacy of judicial restraint is the notion that majority rule should be given the utmost deference under our Constitution. As we have noted, however, he has consistently attacked decisions recognizing Congressional and judicial protections of the voting rights of the electorate such as the "one person/one vote" principle of Reynolds v. Sims 11/. Those decisions have strengthened the political power of the urban areas in which

most blacks and other minorities reside. By contrast, Judge Bork would permit population disparities between voting districts of as much as 21-to-1. 12/

It seems strange that someone who puts so much emphasis on vindicating the rights of the majority would be disinclined to recognize the right of each citizen to be counted, and counted equally, by the political process that is used to determine what the will of the majority is. Judge Bork criticizes some interpretations of the Constitution on the ground that they allow judges to impose views that are not held by the majority. Yet, he simultaneously endorses an interpretation that allows a state to structure its electoral system in a way that invites significant underrepresentation or disfranchisement. The question I have is whether the only plausible consistency between these two views is that each results in denial of a claimed right or liberty.

Judge Bork's Other Criticisms

Judge Bork has described the Bill of Rights as "a hastily drafted document upon which little thought was expended," 13/ and he has repeatedly advocated constitutional interpretations that would diminish civil rights and liberties. For example:

-- Racially restrictive covenants in real estate deeds were used for decades to maintain patterns of segregated

housing. In 1948, the Supreme Court concluded in Shelley v. Kraemer 14/ that enforcement of such covenants violated the Equal Protection Clause. Judge Bork has stated that the Court's unanimous decision in Shelley was unprincipled. 15/ He has said in these hearings that the Shelley case was never followed. 16/ He is wrong. First, Shelley has been followed in the most decisive sense. Racially restrictive covenants are a dead letter. Our citizens can live anywhere. Washington, D.C. today, to take but one example, is not the segregated city it was in 1948 when Shelley and a companion case from the District of Columbia were decided. 17/ Constitutional theory should not ignore constitutional fact. Shelley has made a decisive difference in the lives of our citizens. Its "generative force," to quote Judge Bork, has been profound.

Second, Judge Bork is wrong because Shelley was a strategic victory in the long and ultimately successful struggle dating from the 1930's to overturn the separate-but-equal regime of Plessy v. Ferguson. 18/ It was of decisive importance that a unanimous Court in Shelley delivered a body blow to racial discrimination as it did again, six years later, in outlawing school segregation in Brown v. Board of Education. 19/

Third, Judge Bork is wrong because Shelley has been followed. The Supreme Court in 1953, five years after

Shelley, explicitly relied on it to deny damages for the breach of a racially restrictive covenant. 20/ Judge Bork profoundly misses the point of Shelley which was that the majesty of the courts should not be used to enforce racial discrimination.

It is important to note that Judge Bork's attacks in 1963 and 1964 on the bill which became the 1964 Civil Rights Act 21/ came at a time when thousands of non-violent sit-in demonstrators in the South were arguing that Shelley meant the courts could not be used to enforce the racially discriminatory wishes of lunch counter owners whose facilities were otherwise open to the general public. 22/ Judge Bork's criticisms of Shelley fit with his arguments against the Civil Rights Bill. Both were made in the period 1963 to 1971. It is true, of course, that during the examination of his qualifications to become Solicitor General in 1973, Judge Bork retracted his criticism of the 1964 Civil Rights Act. But under his earlier theory, he would have denied power both to the courts and the Congress to attack racial discrimination in public accommodations.

Until these hearings, Judge Bork consistently opposed application of the Equal Protection Clause to discrimination on any basis other than race. 23/ His belated revision of those views before this Committee gives us little confidence that he would rigorously review

discrimination on grounds such as gender, illegitimacy, and alienage.

-- The Supreme Court unanimously concluded in Brandenburg v. Ohio 24/ that the First Amendment protects all forms of advocacy other than incitement of imminent unlawful action. This was a particularly striking act of judicial statesmanship, not least by Justice Harlan. At the time when Brandenburg was decided in 1969, the country was in the midst of urban riots, massive anti-war demonstrations and underground political movements. Until these hearings, Judge Bork had maintained that Brandenburg was wrongly decided, and that governments could prohibit all advocacy of violation of law. 25/ Under that standard, states could punish any advocacy of nonviolent civil disobedience. Without any prior notice, however, and at a time of relative domestic tranquility, Judge Bork announced to this Committee 26/ that he had abandoned his criticism of the Brandenburg case.

It has been argued, by and on behalf of Judge Bork, that the results he reaches on civil rights issues do not reflect his opinions about substance but are the necessary product of "neutral principles" and "judicial restraint". But Judge Bork's philosophy places him well outside the territory occupied by the most respected advocates of judicial restraint in this century. Judge Bork has pointed to no respected jurist, and we know of none, who has served

up a version of constitutional theory like his. Shelley v. Kraemer, which Judge Bork has condemned, was joined by Justice Frankfurter; Oregon v. Mitchell, which Judge Bork says was wrongly decided, was joined by Justice Harlan; Brandenburg v. Ohio, which Judge Bork once rejected, was also joined by Justice Harlan, and represents the vindication of the views of Justice Holmes; and even the most conservative members of the present Court have concluded, contrary to Judge Bork, that the Equal Protection Clause requires special scrutiny of discrimination on grounds other than race.

A point particularly troublesome to me and one which I do not believe has been given sufficient attention thus far is this: Almost every case that the Supreme Court decides to hear on the merits can be, and is routinely argued by one side to be, controlled by prior decisions of the Court. The other side, of course, contends that the case is different and distinguishable from those prior decisions. It is fair to say that, in those cases which the Supreme Court hears on the merits, there is almost always some room to argue that precedent does not apply.

In the hearings thus far, the focus seems to have been principally on the question whether Judge Bork, if he is confirmed, will vote to overrule certain prior Supreme Court decisions. The problem, however, is that there are

likely to be many important cases heard on the merits by the Supreme Court during Judge Bork's tenure, if he is confirmed, involving fundamental questions of civil rights and civil liberties where some argument can be made that the results in those cases are not compelled by prior decisions of the Supreme Court. In such cases, it would not be necessary explicitly to overrule one or more Supreme Court decisions in order to come to a result that denies the claimed right or liberty. Such results are often achieved by confining precedents to what are said to be the narrow facts upon which they are based, thereby limiting or virtually extinguishing the principles underlying those cases.

Given the extraordinary latitude open to a Justice in adopting such a course, the question which I think the Committee should be concerned with is the direction Judge Bork would take in that area. In his testimony, Judge Bork has significantly broadened his current willingness to tolerate -- and therefore not to overrule -- Supreme Court decisions with which he has previously expressed very strong disagreement. The substantial danger remains, however, that he might well make a majority to overrule key civil rights precedents.

On the other hand, it seems to me that, consistent with his currently held views, Judge Bork could adopt the

position of conforming his vote on arguably new cases to the judicial philosophy he expounded at length prior to these hearings. This is an area of potentially much greater significance than whether he will explicitly overrule any particular Supreme Court precedent.

Judge Bork has pointed out that his views respecting specific Supreme Court cases have sometimes been the same or similar to the views of dissenting conservative justices in those cases or the same as the views of other scholars. These facts are offered to suggest that Judge Bork is in the mainstream of constitutional development. Justice Holmes used to say that when law becomes sophisticated, all questions are questions of degree. It is the degree -- the extreme degree -- and, up to now, the constancy of Judge Bork's attacks on central Supreme Court precedents involving civil rights that separate him from other critics of the Court. I have mentioned specific cases only as examples. They are the trees and some other judges have some of the same trees. The forest of Judge Bork's theories, however, is like that of no other respected jurist.

Conclusion

Can the Senate take the risk that the views Judge Bork has articulated over a professional lifetime have now

been abandoned; that the consistency of his opposition to civil rights and civil liberties principles results only from his wish to be provocative and to challenge the intellectual curiosity of his students? Key and difficult issues of discrimination will be in the Supreme Court in the coming years. They will doubtless include reexamination of the Japanese relocation program during World War II, affirmative action, the validity of testing as a screen for employment, and voting rights. Can the nation risk that the Judge Bork of this month might become, if confirmed, the Judge Bork of last year?

It is no exaggeration to say that the 96 signing members of the national Lawyers' Committee and 214 signing members of the local Committees are in every sense a part of the great mainstream of this country. In our early years, we were fittingly called the President's Committee because President Kennedy brought us to life and every president since then except President Reagan has urged us to continue our work. Until the present hour, we had never taken a public position on any judicial nominee. But this nominee and the hour demand the extraordinary. The work of the members of the Lawyers' Committee is furthering the rights of all Americans, a task threatened by the nomination of Judge Bork, and we oppose his confirmation.

Endnotes

1. Nicholas Katzenbach.

2. Cyrus Vance.

3. Warren Christopher.

4. Drew Days, Burke Marshall, Stephen Pollak.

5. Robert Meserve, Chesterfield Smith.

6. Norman Redlich (NYU), James Vorenberg (Harvard).

7. James v. Humphreys County Board of Election Commissioners, 384 F.Supp. 114 (N.D. Miss. 1974).

8. V.O. Key, Jr., described the discriminatory use of literacy tests in Chapter 26 of his seminal work, Southern Politics (1949), pp. 555-577. The discriminatory use of literacy tests was noted in the House Report on the Voting Rights Act. H.R. Rep. No. 439, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 2437, 2449-50.

9. 400 U.S. 112 (1970).

10. The Human Life Bill: Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97 Cong., 1st Sess. 314 (1981).

11. 377 U.S. 533 (1964).

12. Robert Bork, "The Supreme Court Needs a New Philosophy," Fortune, Dec. 1968 at 166-68; R. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 18-19 (1971) ("Neutral Principles"); Worldnet Interview, June 10, 1987 at 22-23. Nominations of Joseph T. Sneed to be Deputy Attorney and Robert H. Bork to be Solicitor General: Hearings Before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 13 (1973) ("1973 Hearings"). In Neutral Principles and the 1973 Hearings, Judge Bork praised Justice Stewart's dissenting opinion in both Lucas v. Forty-Fourth General Assembly of Colorado and WMCA v. Lomenzo, 377 U.S. 633, 744-65 (1964), a view which Judge Stewart abandoned by 1973, see, e.g., Mahan v. Howell, 410 U.S. 315, 320-30 (1973).

13. Neutral Principles 22.

14. 334 U.S. 1 (1948).

15. Neutral Principles 15-16.

16. Tr. 127, September 15, 1987.

17. Hurd v. Hodge, 334 U.S. 24 (1948).

18. 163 U.S. 537 (1896).

19. 347 U.S. 483 (1954).

20. Barrows v. Jackson, 346 U.S. 249 (1953).

21. R. Bork, "Civil Rights -- A Challenge," The New Republic, Aug. 31, 1963 at 21-24; R. Bork, "Against the Bill", Chicago Tribune, March 1, 1964, p. 1, col. 1.

22. See, e.g., Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); Barr v. City of Columbia, 378 U.S. 146 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964);

Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

23. Compare Neutral Principles 17 with Tr. 210, September 15, 1987. Supreme Court precedents in this area include, e.g., Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980) (gender); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); In re Griffins, 413 U.S. 717 (1973) (aliens).

24. 395 U.S. 444 (1969).

25. Worldnet Interview, June 10, 1987, at 30-31

26. Tr. 121, September 16, 1987

ON THE NOMINATION OF JUDGE ROBERT H. BORK
AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

This statement is submitted on behalf of the members of the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law whose names are listed in Appendix A.

The Lawyers' Committee was organized in 1963 at the request of President John F. Kennedy in order to bring the resources of the private bar to bear on solving our nation's civil rights problems. Presidents Lyndon B. Johnson, Richard M. Nixon, Gerald R. Ford, and Jimmy Carter asked the Committee to continue its work. The Committee's members include Democrats and Republicans, liberals and conservatives. Some of our members have served in government as United States Attorneys General and Assistant Attorneys General and in other positions; others have remained in private practice. All of our members are committed to the rule of law.

Judge Bork's record of writings and speeches reflects strong and consistent opposition to many of the central principles for which the Lawyers' Committee has fought. Judge Bork has described the Bill of Rights as "a hastily drafted document upon which little thought was expended," and he has repeatedly advocated constitutional

interpretations that would diminish civil rights and liberties. For example:

-- Congress has banned the use of literacy tests in voting, finding that they were pervasively used as a tool to disfranchise blacks and other minorities. The Supreme Court, in Oregon v. Mitchell, unanimously concluded that Congress had the power to protect voting rights in this way. Judge Bork has condemned Oregon v. Mitchell as "pernicious" constitutional doctrine.

-- Since Reynolds v. Sims in 1964, the federal courts have monitored the apportionment of state legislatures to ensure that the votes of all citizens are given roughly equal weight. Those decisions have strengthened the political power of the urban areas in which most blacks and other minorities reside. Judge Bork has rejected the "one person/one vote" principle of Reynolds v. Sims.

-- Racially restrictive covenants in real estate deeds were used for decades to maintain patterns of segregated housing. In 1948, the Supreme Court concluded in Shelley v. Kraemer that enforcement of such covenants violated the Equal Protection Clause. Judge Bork has stated that the Court's unanimous decision in Shelley was incorrect.

-- Since 1970, the Supreme Court has applied the Equal Protection Clause to strike down laws that discriminate on the basis of gender, illegitimacy, and alienage. Judge Bork has opposed application of the Equal Protection Clause to discrimination on any basis other than race.

-- The Supreme Court unanimously concluded in Brandenburg v. Ohio that the First Amendment protects all forms of advocacy other than incitement of imminent unlawful action. Judge Bork has stated that Brandenburg was wrongly decided, and that governments should be permitted to prohibit all advocacy of violation of law. Judge Bork's standards would permit states to punish any advocacy of nonviolent civil disobedience.

It has been argued, by and on behalf of Judge Bork, that the results he reaches on these issues do not reflect his opinions about substance but are the necessary product of "neutral principles" and "judicial restraint". But Judge Bork's philosophy places him well outside the territory occupied by the most respected advocates of judicial restraint in this century. Shelley v. Kraemer, which Judge Bork has condemned, was joined by Justice Frankfurter; Oregon v. Mitchell, which Judge Bork says was wrongly decided, was joined by Justice Harlan; Brandenburg v. Ohio, which Judge Bork rejects, was also joined by

Justice Harlan, and represents the vindication of the views of Justice Holmes; and even the most conservative members of the present Court have concluded, contrary to Judge Bork, that the Equal Protection Clause requires special scrutiny of discrimination on grounds other than race.

We conclude that the nomination of Judge Bork to the United States Supreme Court jeopardizes the continued vitality of civil rights and liberties long enjoyed by all Americans, and we oppose his confirmation.

oOo

APPENDIX A PART I

Albert E. Arent
Thomas I. Atkins
Richard F. Babcock
Thomas D. Barr
St. John Barrett
G. d'Andelot Belin
Richard I. Beattie
Wiley A. Branton
Jack E. Brown
Tyrone Brown
William H. Brown, III
Goler Teal Butcher
Robert Carswell
Julius LeVonne Chambers
Warren Christopher
Ramsey Clark
Jerome A. Cooper
Michael A. Cooper
James T. Danaher
Drew S. Days, III
Armand G. Derfner
Sara-Ann Determan
Adrian W. DeWind
Richard C. Dinkelspiel
John W. Douglas
Robert Ehrenbard
Fred N. Fishman
Cassandra Flipper
Jefferson B. Fordham
Laurence S. Fordham
Alexander Forger
John P. Frank
L. Richard Freese, Jr.
John D. French
Edward M. Friend, Jr.
Lloyd K. Garrison
A. Spencer Gilbert
Michael H. Gottesman
William M. Guttman
Herbert J. Hansell
Conrad K. Harper
Stanley P. Hebert
Jerome E. Hyman
Roy William Ide, III
Hugh R. Jones, Jr.
John B. Jones
Peter Jones
Claude H. Hogan

Edward E. Kallgren
Robert H. Kapp
Nicholas deB. Katzenbach
Maximilian W. Kempner
Stuart J. Land
Robert Landis
John V. Lindsay
George N. Lindsay
Hans Loeser
Henry L. Marsh
Burke Marshall
Joseph P. Martori
Robert B. McKay
Robert W. Meserve
Ronald S. Miller
Robert F. Mullen
Robert A. Murphy
James M. Nabrit, III
Frederick M. Nicholas
Sheldon Oliensis
Kenneth Penegar
Stephen J. Pollak
Norman Redlich
Allan H. Reuben
James Robertson
Edwin A. Rothschild
Charles Runyon
Lowell E. Sachnoff
Stephen H. Sachs
David M. Satz
John H. Schafer
Jerome G. Shapiro
Arthur D. Shores
Chesterfield Smith
McNeill Smith
Asa D. Sokolow
Nicholas U. Sommerfeld
David S. Tatel
John Tobin
Michael Traynor
Marna Tucker
Cyrus Vance
James Vorenberg
Herbert M. Wachtell
John W. Wade
Francis M. Wheat
Roger Wilkins
Karen Hastie Williams

APPENDIX A PART II

LAWYERS AFFILIATED WITH LOCAL LAWYERS' COMMITTEE

Boston

Kathryn Abrams

Edward J. Barshak

Mark F. Brodin

James K. Brown

Judith Olans Brown

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Frank Winston

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

September 14, 1987

Hon. Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510-6275

Dear Senator Biden:

As the Co-Chairmen of the Lawyers' Committee for Civil Rights Under Law we herewith submit on behalf of the individual members of the Board of Trustees whose names appear at Appendix A, Part I, our statement in opposition to the nomination of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court. The statement is endorsed as well by members of the seven independent local affiliate Lawyers' Committees for Civil Rights whose names appear also at Appendix A, Part II.

We enclose at Appendix B a copy of an analysis of Judge Bork's legal philosophy pertaining to civil rights issues. This memorandum will serve as the basis for testimony to be offered at the confirmation hearings by a designated member of the Board of Trustees.

We believe that the members of the Lawyers' Committee who have joined us in opposition to Judge Bork have done so because the record demonstrates that Judge Bork has strongly and consistently opposed many of the priniciples for which the Lawyers' Committee has fought for almost twenty-five years. His confirmation would put at risk the continued enjoyment of civil rights and liberties that many Americans now take for granted.

We look forward to sharing with you in more detail the basis for our conclusions at the confirmation hearings.

Sincerely,

Conrad K. Harper
Co-Chairman

Stuart J. Land
Co-Chairman

APPENDIX B:

MEMORANDUM ON THE NOMINATION OF JUDGE ROBERT H. BORK

AS AN ASSOCIATE JUSTICE TO THE

UNITED STATES SUPREME COURT

ON THE NOMINATION OF JUDGE ROBERT H. BORK
AS AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

In the 24 years since the formation of the Lawyers' Committee for Civil Rights Under Law, we have witnessed and participated in the continued vindication and expansion of civil rights, particularly by the Federal judiciary. With some pauses and despite occasional lapses, that process has continued in this country for more than 50 years. The nomination of Judge Robert H. Bork of the Court of Appeals for the District of Columbia Circuit as an Associate Justice of the Supreme Court raises a serious threat that what we view as progress through generally correct decisions by the Court will, as a result, cease or even be reversed.

This memorandum assesses Judge Bork's public positions on five areas of civil rights. The memorandum also examines Judge Bork's academic writings about judicial philosophy in an effort to lend context to his views on specific issues and to provide understanding of how Judge Bork might decide future cases. Finally, consideration is given to how Judge Bork's judicial philosophy appears to have been applied in the context of the civil liberties involved in individual and family privacy and the First Amendment.

We have attempted to present an accurate picture of Judge Bork's views, based on writings available to us. When Judge Bork has taken a position in writing, we assume that he continues to adhere to that position unless he has publicly revised his views.

We do not here discuss in any detail Judge Bork's work as either Solicitor General of the United States or as a Judge on the United States Court of Appeals for the District of Columbia Circuit. Judge Bork has indicated that his conception of the duties of those offices substantially constrained his ability to express his own views. At his appellate court confirmation hearings, Judge Bork testified that a lower court judge has "a duty of absolute obedience to Supreme Court precedent". 1/ Similarly, his view of the role of the Solicitor General is that of the government's lawyer--an advocate for a client's view, rather than the client itself: " . . . I would continue the policy of the Justice Department even if I disagreed as an academic with that policy". 2/

1/ Confirmation Hearing on Nomination of James T. Moody, Michael S. Ranne, Alan C. Nelson, and Robert H. Bork, Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 5 (Jan. 27, 1982) (statement of Robert H. Bork) [hereinafter Hearings on D.C. Circuit Nomination].

2/ Nominations of Joseph T. Sneed To Be Deputy Attorney

In his writings, Judge Bork has contended that the role of the courts in protecting individual freedoms should be sharply curtailed in the name of "judicial restraint". Judge Bork's vision of the proper role of the Courts frequently differs radically from that of even those members of the Supreme Court best known for their commitment to "judicial restraint". In particular:

(i) Judge Bork condemns as "pernicious" constitutional doctrine 3/ the unanimous decision of the Supreme Court (including Justice Harlan) in Oregon v. Mitchell, 4/ which upheld Congress' power to ban the use of literacy tests in voting, Congress having concluded that such tests were pervasively used as tools to disfranchise blacks and other minorities.

(ii) Judge Bork believes that there is "no warrant" for precluding courts from enforcing racially

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General and Robert H. Bork To Be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 8 (1973) (statement of Robert H. Bork) [hereinafter Hearings on Solicitor General Nomination].

3/ The Human Life Bill: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 97th Cong., 1st Sess. 314 (1981) (statement of Robert H. Bork) [hereinafter Hearings on Human Life Bill].

4/ 400 U.S. 112 (1970). See infra pp. 6-8.

restrictive covenants in real estate deeds, 5/ contrary to the unanimous decision of the Supreme Court (including Justice Frankfurter) in Shelley v. Kraemer; 6/

(iii) Judge Bork would oppose, as "improper and intellectually empty", 7/ application of the Equal Protection Clause to discrimination on the basis of gender or any other nonracial criterion, even though the Supreme Court (including then-Justice Rehnquist) has unanimously concluded that the Equal Protection Clause is not limited to racial discrimination; 8/

(iv) Judge Bork would seek to reverse a long line of decisions protecting the privacy of individuals and their families, in which the most respected advocates of "judicial restraint" (Justices Frankfurter and Harlan) have joined; 9/

(v) Judge Bork would permit states to punish all advocacy of nonviolent civil disobedience, contrary to

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5/ Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 11 (1971) [hereinafter Neutral Principles].

6/ 334 U.S. 1 (1948). See infra pp. 13-14.

7/ Neutral Principles, supra note 5, at 12.

8/ See infra pp. 14-20.

9/ See infra pp. 33-40.

the Supreme Court's unanimous decision in Brandenburg v. Ohio. 10/

Judge Bork's opposition to Supreme Court civil rights decisions based on "judicial restraint" is not always at odds with the positions taken by all Justices on the Court. For example, Judge Bork's criticism of Katzenbach v. Morgan 11/ is essentially the same as the dissent of Justice Harlan (joined by Justice Stewart) in that case. 12/ Judge Bork's criticism of Harper v. Virginia Board of Education 13/ is essentially the same as the dissents of Justice Black and Justice Harlan (joined by Justice Stewart) in that case. 14/ In general, however, Judge Bork's view of Supreme Court civil rights decisions appears less reflective of "judicial restraint"--at least as that term has heretofore generally been understood--than of his attitude toward the Bill of Rights generally, which he has described as "a

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10/ 395 U.S. 444 (1969).

11/ 384 U.S. 641 (1966).

12/ See 384 U.S. at 659 (Harlan, J., dissenting).

13/ 383 U.S. 663 (1966).

14/ See 383 U.S. at 670 (Black, J., dissenting); id. at 680 (Harlan, J., dissenting).

hastily drafted document upon which little thought was expended". 15/

I. Judge Bork's Views on Civil Rights

We here discuss Judge Bork's views on five issues relating to civil rights: (1) Congress' power under the Fourteenth and Fifteenth Amendments; (2) proposed legislation to curtail busing as a remedy for school segregation; (3) the principle of "one man/one vote"; (4) the enforcement of racially restrictive covenants; and (5) the types of discrimination that the Equal Protection Clause should be read to forbid.

A. Congressional Power Under the Fourteenth and Fifteenth Amendments. In a series of cases in the 1960s and early 1970s, the Supreme Court reviewed the constitutionality of various provisions of the Voting Rights Act of 1965 (and later amendments to that Act). In the last of those cases, Oregon v. Mitchell, the Supreme Court held that Congress had the power, under the Fourteenth and Fifteenth Amendments, to prevent states from imposing literacy tests as a precondition to voting. 16/ Congress had imposed this

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15/ Neutral Principles, supra note 5, at 22.

16/ 400 U.S. 112 (1970). Eight Justices found that Congress had this power under the Enforcement Clause of the

ban based on "a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race". 17/ Every member of the Supreme Court agreed that Congress had the necessary power under the Constitution to protect voting rights in this way; even Justice Harlan, who "took the most restrictive view of congressional powers under the post-Civil War Amendments", 18/ agreed that Congress' ban on literacy tests was "a valid exercise of congressional power". 19/

Judge Bork has characterized Oregon v. Mitchell as "very bad, indeed pernicious, constitutional law". 20/ Judge Bork would thus sharply limit Congress' ability to protect the right to vote, although even the most jurisprudentially cautious members of the Court that decided Oregon

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Fourteenth Amendment. Justice Harlan concluded that Congress' power derived from the Fifteenth Amendment. Judge Bork has argued that Congress lacks enforcement power under either the Fourteenth or the Fifteenth Amendment to enact legislation banning literacy tests absent a specific showing of racial discrimination. Bork, Constitutionality of the President's Busing Proposals, 9 (American Enterprise Institute 1972).

17/ 400 U.S. at 132 (opinion of Black, J.).

18/ G. Gunther, Constitutional Law, 935 (1985).

19/ 400 U.S. at 217 (Harlan, J., concurring).

20/ Hearings on Human Life, supra note 3, at 314.

v. Mitchell concluded that Congress could properly do so. 21/

B. Judge Bork's Support for the Nixon Administration's Busing Legislation. In 1971, the Supreme Court unanimously held in Swann v. Charlotte-Mecklenburg Board of Education 22/ that the Federal courts could direct the use of busing to desegregate a school system. In response, the Nixon administration proposed a bill that would have strictly limited the circumstances under which courts could order that school children be bused to achieve racial balance, including an absolute prohibition on busing children in grades K-6.

Judge Bork, who served as a consultant on the proposed legislation, also testified before Congress on the constitutionality of the bill. Bork argued that the bill was within Congress' authority to regulate the remedies available to the federal courts. 23/ So long as Congress

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21/ See supra note 16 and accompanying text.

22/ 402 U.S. 1 (1971).

23/ Equal Educational Opportunities Act: Hearings Before the House Committee on Education and Labor on H.R. 13915, 92d Cong., 2d Sess. 1507 (1972) (statement of Robert H. Bork) [hereinafter Hearings on H.R. 13915].

did not abrogate all remedies necessary to vindicate a constitutional right, no justiciable issue was implicated:

> "The reason Congress has general power over remedies is clear. Remedies unlike basic rights often require compromises between competing values and the nature of that compromise, being political in the broadest and best sense, is one for which an elected and representative legislature, rather than courts, are better suited". 24/

The then-General Counsel of the NAACP (and now Judge) Nathaniel R. Jones testified against the bill. He termed it "a racist measure", built upon the "erroneous assumption" that the abolition of dual school systems "is virtually completed". 25/

The Lawyers' Committee submitted a statement in opposition to the bill as well, arguing that this effective moratorium on busing would impose constitutional injury on individuals in cases where the appropriate remedy for an unconstitutional wrong had been placed beyond the authority of the courts. The Lawyers' Committee based its position on, inter alia, Hayburn's Case 26/ and United States v. Klein, 27/ the latter of which invalidated a Congressional

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24/ Id. at 1507.

25/ Id. at 1517 (statement of Nathaniel R. Jones).

26/ 2 U.S. (2 Dall.) 408 (1792).

27/ 80 U.S. (13 Wall.) 128 (1871).

attempt to limit the jurisdiction of the federal Courts on separation of powers grounds.

The Lawyers' Committee also relied upon the Supreme Court's rejection of the notion that Congress can emasculate the Court's exercise of its jurisdiction where the underlying rights are within the Court's province to protect:

> "Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at that same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority". 28/

The issue was clearly drawn: whether Congress could preclude remedies important to vindicating underlying constitutional rights. As Judge Bork admitted, "I would think it highly doubtful Congress could ban busing and have that statute stand up in the courts. We are dealing with an area of degree here". 29/ But, as Judge Jones and the Lawyers' Committee argued, the "degree" involved in so fundamentally infringing upon the prerogatives of the judiciary was sufficiently great to vitiate the right itself.

28/ Schneiderman v. United States, 320 U.S. 118, 168-69 (1943) (Rutledge, J., concurring).

29/ Hearings on H.R. 13915, supra note 23, at 1509.

Judge Bork offered no literal reading of the Constitution to support his right versus remedy distinction. Nor did he cite to any evidence of "original intent" to justify it.

C. One Man/One Vote. Beginning with Baker v. Carr and Reynolds v. Sims in the 1960s, the Supreme Court has closely examined the apportionment of state legislatures and other electoral bodies to ensure that the votes of all citizens are given roughly equal weight. 30/ Prior to Baker v. Carr, many states had apportioned their legislatures so as to give cities far less political power, and rural areas far more, than was warranted based on population. 31/ Baker v. Carr and its progeny have vastly improved the equality of state apportionment plans; among other things, they have greatly increased the representation of the urban areas in which most black and other minority voters reside.

30/ See, e.g., Brown v. Thompson, 462 U.S. 835 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Although the Court has permitted variations from mathematical equality in some instances, it has done so only based on a finding that the deviation is justified by "legitimate state considerations". Reynolds, 377 U.S. at 577-79.

31/ See Reynolds, 377 U.S. at 567 n.43.

Judge Bork has repeatedly rejected the underlying principle of Reynolds v. Sims, contending that "one man/one vote" has "no theoretical basis" 32/ and imposes "too much of a straitjacket" on the states. 33/ Although Judge Bork has suggested that some degree of judicial intervention to ensure fairness in legislative apportionment may be appropriate under Article IV of the Constitution (guaranteeing every state a republican form of government), 34/ he has indicated that the role of the courts should be very limited. Specifically, Judge Bork has praised a standard once proposed by Justice Stewart, under which the court would examine only whether the proposed apportionment is "rational" and would not "systematic[ally] frustrat[e] the majority's will". 35/ Applying that standard (which he subsequently abandoned), Justice Stewart would have approved

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32/ Hearings on Solicitor General Nomination, supra note 2, at 13; Neutral Principles, supra note 5, at 18-19 ("Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument").

33/ Hearings on Solicitor General Nomination, supra note 2, at 13.

34/ See Neutral Principles, supra note 5, at 19.

35/ Id.; see Hearings on Solicitor General Nomination, supra note 2, at 13.

an apportionment plan in which the votes of some citizens were worth 21 times as much as the votes of others. 36/

D. Enforcement of Racially Restrictive Covenants. For decades, racially restrictive covenants in real estate deeds were used to enforce patterns of segregation in housing. In 1948, the Supreme Court unanimously held in Shelley v. Kraemer that state court enforcement of such covenants violated the Equal Protection Clause. Judge Bork has argued that there is "no warrant" for the decision in Shelley. 37/

Rejecting the result of Shelley, as Judge Bork has proposed, would amount to judicially approving--on abstract technical grounds--one of the linchpins of a segregated society. This result would contradict a principle that Judge Bork has elsewhere endorsed: "Justice Story may have had hold of a profound truth when he said that '[u]pon subjects of government . . . metaphysical refinements are out of place. A constitution . . . is addressed to the

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36/ WMCA v. Lomenzo, 377 U.S. 633, 744-65 (1964) (Stewart J., dissenting). By 1973, Justice Stewart had joined the majority of the Court on this issue. See, e.g., Mahan v. Howell, 410 U.S. 315, 320-30 (1973).

37/ Neutral Principles, supra note 5, at 11.

common sense of the people and was never designed for trials of logical skill, or visionary speculation'". 38/

E. The Scope of the Equal Protection Clause. Since 1970, the Supreme Court has repeatedly considered the extent to which the Equal Protection Clause of the Fourteenth Amendment--which requires that the equal protection of the laws not be denied to "any person" 39/--bars discrimination on grounds other than race. 40/ The issue is not a simple one, and members of the Court have disagreed about what specific standards to apply in particular cases. But there has been a consensus on the Court that the Equal Protection Clause does preclude discrimination on some grounds other than race.

In analyzing nonracial Equal Protection claims, the Court has sought to determine whether the characteristic

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38/ Bork, Styles in Constitutional Theory, 26 S. Tex. L. J. 383, 385 (1985) (quoting J. Story, Commentaries on the Constitution of the United States, at viii (3d ed. Boston 1858)) (ellipses in Bork's text).

39/ U.S. Const. amend XIV, § 1.

40/ See, e.g., Pickett v. Brown, 462 U.S. 1 (1983) (illegitimacy); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (gender); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (age); In Re Griffiths, 413 U.S. 717 (1973) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Reed v. Reed, 404 U.S. 71 (1971) (gender).

at issue--whether gender, age, alienage, illegitimacy or some other trait--is sufficiently similar to race in functional respects to warrant special scrutiny. A 1985 opinion by Justice White summarizes the applicable principles. In that decision, City of Cleburne v. Cleburne Living Center, Inc. 41/ Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens and O'Connor, explained that while "[t]he general rule [under the Equal Protection Clause] is that legislation is presumed to be valid", that presumption "gives way . . . when a statute classifies by race, alienage, or national origin". Those factors, the Court held, "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . ." 42/ For similar reasons, classifications based on gender and illegitimacy require an heightened level of scrutiny. 43/

The Cleburne Court ultimately rejected the plaintiffs' argument--that discrimination based on mental retardation must be given a high level of scrutiny under the

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41/ 473 U.S. 432 (1985).

42/ Id. at 440.

43/ See id. at 440-41.

Equal Protection Clause--over a partial dissent by three Justices. 44/ However, the Court was unanimous in concluding that the Equal Protection Clause does require special scrutiny of discrimination on some grounds other than race. 45/ In nonracial cases decided under the Equal Protection Clause, the Court has struck down, among other things, a state law that gave a husband the right to dispose of jointly owned community property without his wife's

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44/ The Court invalidated part of the ordinance at issue under a "rational" basis test. See id. at 449-50. See also id. at 455-78 (Marshall, J., concurring in the judgment in part and dissenting in part).

45/ Justice Rehnquist joined the majority opinion in Cleburne. He also wrote for the majority in Mills v. Habluetzel, 456 U.S. 91 (1982), in which the Court applied a heightened standard of scrutiny to a classification based on legitimacy. See 456 U.S. at 99 ("restrictions [based on legitimacy] will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"). Justice Rehnquist later joined the unanimous opinion of the Court in Pickett v. Brown, in which the Court stated that "in view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny". 462 U.S. 1, 8 (1983). These opinions represented a modification of Justice Rehnquist's statements in such cases as Trimble v. Gordon, 430 U.S. 762, 776-86 (1977) (Rehnquist, J., dissenting).

Justice O'Connor has also endorsed the application of the Equal Protection Clause to nonracial claims. See, e.g. Pickett v. Brown, 462 U.S. 1 (1983) (illegitimacy); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (gender discrimination).

consent, 46/ a state statute barring any alien from becoming a notary public, 47/ and a state law imposing a one-year time limit on suits to establish an illegitimate child's right to child support, while imposing no time limit on the right of a legitimate child to sue for support. 48/

Judge Bork's academic writings reject this entire body of constitutional doctrine. Rather than struggle with the hard questions, as the Supreme Court has done, Judge Bork has taken a far simpler, more narrow approach. He has argued that the Equal Protection Clause has only two legitimate meanings: "It can require formal procedural equality, and, because of its historical origin, it does require that the government not discriminate along racial lines. But much more than that cannot properly be read into the clause". 49/ Judge Bork argued that "the bare concept of equality provides no guide for the courts", and that there is "no principled way of saying which nonracial

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46/ Kirchberg v. Feenstra, 450 U.S. 455 (1981). The Court was unanimous in this result, although Justices Stewart and Rehnquist filed a concurring opinion.

47/ Bernal v. Fainter, 467 U.S. 216 (1984). The vote on this decision was 8-1 (Rehnquist, J., dissenting).

48/ Mills v. Habluetzel, 456 U.S. 91 (1982). Justice Rehnquist wrote for a unanimous Court.

49/ Neutral Principles, supra note 5, at 11.

inequalities are impermissible". 50/ Thus, in 1971, he rejected as "improper and intellectually empty" a series of Court decisions applying the Equal Protection Clause to invalidate statutory distinctions not based on race. 51/

Judge Bork's recent writings and speeches suggest that he continues to believe that the Equal Protection Clause stops at racial discrimination. In a speech in 1982, he stated that "when [the courts] begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid on them . . . . All of these are nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to

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50/ Id. at 11.

51/ Id. at 12 (discussing Shapiro v. Thompson, 394 U.S. 618 (1969) (state forbidden to limit welfare benefits to persons who have resided in state for one year); Levy v. Louisiana, 391 U.S. 68 (1968) (state may not limit wrongful death action for parent's death to legitimate children and deny it to illegitimate children); and Skinner v. Oklahoma, 316 U.S. 535 (1942) (state's decision to sterilize robbers but not embezzlers forbidden)). Since Levy, the Court has continued to give special scrutiny to classifications based on illegitimacy. See, e.g., Pickett v. Brown, 462 U.S. 1 (1983).

which these judges and their defenders belong". 52/ Similarly, in a 1985 article, Judge Bork explained how an "intentionalist" (a term he uses to describe himself) could conclude that "he must enforce black and racial equality but that he has no guidance at all about any higher level of generality". 53/

Finally, in a recent interview, Judge Bork said that he "do[es] think the Equal Protection Clause probably should have been kept to things like race and ethnicity." 54/ Judge Bork's statements thus strongly suggest that he would seek to limit or eliminate the Court's role in protecting against government discrimination on the basis of gender, alienage and illegitimacy.

Judge Bork's views on civil rights are best understood in relation to his judicial philosophy. The next section of this memorandum traces the evolution of Judge Bork's theories of constitutional law.

52/ Federalism and Gentrification, Address by Judge Bork to the Federalist Society, Questions and Answers at 9-10 (April 24, 1982).

53/ Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 828 (1986) [hereinafter Original Intent].

54/ Worldnet, United States Information Agency (June 10, 1987) at 12.

II. Judge Bork's Judicial Philosophy

Prior to 1970, Judge--then Professor--Bork attempted to articulate a general theory of when government is authorized to coerce the individual and when it is not. Eventually, he abandoned that effort as unworkable. 55/ Before doing so, however, he applied that theory to oppose adoption of the provisions of the Civil Rights Act of 1964 that prohibited discrimination in public accommodations and employment. In Judge Bork's opinion the "freedom" to discriminate outweighed the right of blacks and other minorities to equal treatment in public accommodations and in employment. Judge Bork concluded:

> "The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness". 56/

55/ Judge Bork's colleague, Professor Alexander Bickel of the Yale Law School, had contended that such a distinction could not be drawn viably and consistently. After Professor Bickel's death in November of 1974, Judge Bork acknowledged that his colleague had been correct. See N.Y. Times, Jul. 8, 1987, at A1, col. 1.

56/ Bork, Civil Rights--A Challenge, New Republic, Aug. 31, 1963, at 22 [hereinafter Civil Rights]. See also Chicago Tribune, March 1, 1964, at p.1, col.1. Unlike the members of Congress who opposed the 1964 Civil Rights Act--many of whom faced significant constituent pressure on that subject--Judge Bork was free to take the position that he personally viewed as correct.

Similarly, in a published letter at the time, Judge Bork denounced the proposed legislation on the basis that it "would coerce one man to associate with another on the ground that his personal preferences are not respectable. . . ." In that letter Judge Bork took the view that the legislation "represent[ed] such an extraordinary incursion into individual freedom, and open[ed] up so many possibilities of government coercion on similar principles, that it ought to fall within the area where law is regarded as improper". 57/

Judge Bork further argued that,

> "[H]eretical though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle. The discussion we ought to hear is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so". 58/

Judge Bork concluded that the right of the individual to be free from governmental coercion, in the form of legislation enacted by the representatives of the majority, is accurately characterized as a "freedom". "The trouble with freedom," he observed, "is that it will be used in ways we

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57/ Quoted in Hearings on Solicitor General Nomination, supra note 2, at 14.

58/ Civil Rights, supra note 56, at 22.

abhor. It then takes great self restraint to avoid sacrificing it, just this once, to another end". 59/

Judge Bork discussed this philosophy more extensively in a 1968 article published in Fortune, in which he embraced a notion of the individual's "natural rights". 60/ The article first denounced the "judicial activism" of the Warren Court as "result orientation" and "interest voting", with Judge Bork arguing that "the philosophy of interest voting . . . involves deception of the governed and, over the course of time, imperils the Court's power to govern". 61/

Judge Bork accepted, however, that the distinction between activism and restraint is not binary:

> "A desire for some legitimate form of judicial activism is inherent in a tradition that runs strong and deep in our culture, a tradition that can be called 'Madisonian'. We continue to believe there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumes that in wide areas of life a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes that there are some aspects of life a majority should

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59/ Id. at 24.

60/ Bork, The Supreme Court Needs a New Philosophy, Fortune, Dec. 1968, at 138 [hereinafter New Philosophy].

61/ Id. at 140.

not control, that coercion in such matters is tyranny, a violation of the individual's natural rights". 62/

He also argued that the Supreme Court is the only appropriate body to draw the line between the majority's right to govern--to coerce--and the individual's "natural rights": "it is precisely the function of the Court to resolve this dilemma by giving content to the concept of natural rights in case-by-case interpretation of the Constitution". 63/

Thus, Judge Bork argued, it is unacceptable for the Court to define the limits of constitutional coercion by means of value judgments, or "interest voting". According to him, that was precisely the defect which was "widely believed" to "afflic[t] some members of the Warren Court"--"that they decide cases not according to the criteria they cite but according to their social and political sympathies". 64/ Instead, the only permissible activism is one in defense of "natural rights". Judge Bork argued that there is a specific "warrant" in the Constitution itself "for the Court to move beyond the limited range of substantive rights that can be derived from the traditional sources

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62/ Id. at 168 (emphasis added).

63/ Id.

64/ Id. at 140.

of constitutional law": 65/ the "long ignored" Ninth Amendment. 66/ Under the authority of the Ninth Amendment, in contrast with what Judge Bork perceived as the majority's "activism" in Griswold v. Connecticut, in which the Court struck down a law prohibiting use of contraceptives by married couples, 67/ "the judge can construct principles that explain existing constitutional rights and extrapolate from them to define new natural rights". 68/

According to Judge Bork, those principles would, in turn, define the dividing point between permissible majority coercion and individual autonomy. Judge Bork rejected the right of privacy as the guiding principle and instead suggested that "the Court can draw a line . . . by ruling that the majority may prohibit morally or aesthetically offensive nonpolitical behavior where the public must

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65/ Id. at 170.

66/ The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". U.S. Const. amend. IX.

67/ 381 U.S. 479 (1965).

68/ New Philosophy, supra note 60, at 170; see also Griswold, 381 U.S. at 486-99 (Goldberg J., concurring).

observe it, but cannot reach conduct out of sight on such a rationale". 69/

In sum, by 1968, Judge Bork's philosophy of individual autonomy had evolved into a call for a form of judicial restraint: a rejection of judicial action grounded in the Court's sense of "morality", "ethics" or "aesthetics", coupled with a recognition that the Court must sometimes act to protect "natural rights", and that it must sometimes discover "new rights" in order to do so.

Since 1970, Judge Bork has expressed a philosophical framework that he admits differs significantly from his earlier views. His post-1970 position, on the one hand, might be viewed as a simple rejection of his earlier position, which painted the Court as the arbiter between governmental authority and individual "freedom". On the other hand, it might be seen as the ultimate extension of the earlier theory: as an insistence that "original intent is the only legitimate basis for constitutional decision

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69/ The non-political nature of the conduct was important to Judge Bork's theory because it lowered the stature of the constitutional protection afforded it. He placed in a higher, "first tier" of constitutional freedoms those "that are primarily political". See New Philosophy, supra note 60, at 174.

making" 70/ and that, in the absence of explicit constitutional authority, the will of the majority must in all instances prevail.

In 1971, Judge Bork explicitly renounced his earlier view that the basic principle of individual autonomy underlying the Bill of Rights could support the extrapolation of "new rights". Instead, he articulated a far narrower concept, stating that a "judge must stick close to the text and the history [of the Constitution], and their fair implications, and not construct new rights". 71/ He advocated that theory in arguing against the very same "value choosing" at which he had aimed his earlier, natural rights philosophy. Now, he contended that if "constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other". 72/ Thus, he argued that a court could not distinguish between an electric utility's "right" to pollute and a married couple's "right" to use contraceptives without punishment. 73/

70/ Original Intent, supra note 53, at 827.

71/ Neutral Principles, supra note 5, at 8.

72/ Id.

73/ See Neutral Principles, supra note 5, at 10.

In the resulting absence of a clear constitutional limitation on the power of the legislature, Judge Bork now adopts a doctrine of "majoritarianism". What Judge Bork had once called the "unsurpassed ugliness" inherent in the majoritarian (legislative) push behind the Civil Rights Act, now appears to him to be the only "principled" avenue open to the Court: recognition of the prerogatives of the majority. In 1973, at his confirmation hearings for the position of Solicitor General, Judge Bork disavowed his earlier opposition to the Civil Rights legislation as having been "on the wrong track altogether". 74/ Necessarily, given the evolution of his judicial philosophy in the intervening ten years, he based that reversal on his abandonment of any effort to limit majoritarian power by the concept of individual autonomy or "natural rights" and accepted instead a broad deference to majority decisions expressed by the legislature.

What Judge Bork had once called the "valid and valuable" idea of deriving new rights from old he now disparaged. Hence, Judge Bork concluded that the courts "must accept any value choice the legislature makes unless

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74/ Hearings on Solicitor General Nomination, supra note 2, at 14.

it clearly runs contrary to a choice made in the framing of the Constitution". 75/

On the basis of that analysis, Judge Bork believes that broad areas of constitutional case precedent over the preceding twenty years should be reformulated. 76/ He finds that most of the cases involving "substantive equal protection" have been improperly decided: "[t]he modern Court, we need hardly to be reminded, used the equal protection clause the way the old court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws". 77/

Speaking generally concerning the Warren Court's civil rights decisions, Judge Bork stated:

> "The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an

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75/ Neutral Principles, supra note 5, at 8.

76/ Judge Bork asserts, in Neutral Principles, supra note 5, at 11, that Griswold revived "substantive due process" which has, in his opinion, always been an improper doctrine. Thus, the antecedents to Griswold which he defines as also "wrongly decided" include Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute forbidding teaching of school subjects in language other than English struck down); and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state statute compelling all Oregon children to attend public schools struck down).

77/ Neutral Principles, supra note 5, at 12.

institutionalized role as perpetrator of limited coups d'etat." 78/

In contradiction of his earlier recognition of "individual autonomy," Judge Bork now asserts:

> "There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions". 79/

The only exception which the Court may make, in his view, to ratification of a legislative resolution of a "political question" is through finding a clear, explicit constitutional provision to the contrary. When the Court must, of necessity, look beyond the bare words of the Constitution to divine its meaning, it must confine its interpretation to the "original intent" of the framers. That, in Judge Bork's view, is the only license to which the Court is entitled in its role as arbiter of majority versus minority will. 80/

Importantly, Judge Bork does accept that the "original intent" of the framers of the Reconstruction Amendments was to ensure equality of legal protection to

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78/ Id. at 6.

79/ Id. at 12.

80/ Id. at 3-4.

blacks. However, he asserts that "cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or equal protection clause. Such rights cannot be constructed without comparing the worth of individual gratifications, and the comparison cannot be principled". 81/

In a 1982 article, he criticized broader theories of constitutional construction by finding "a curious consistency about these theories" which always "end up . . . prescribing a constitutional law which is considerably more egalitarian and socially permissive than either the written Constitution or the state of legislative opinion in the American public today". 82/ Judge Bork's broad embrace of majoritarianism has remained a consistent theme. In a 1985 interview, he stated, "I finally worked out a philosophy that is pretty much expressed in that 1971 Indiana Law Journal piece." 83/

In 1986, he protested that:

81/ Neutral Principles, supra note 5, at 17.

82/ Bork, The Struggle Over the Role of the Court, National Review, Sept. 17, 1982, at 1137.

83/ McGuigan, Judge Robert Bork is a Friend of the Constitution, Conservative Digest, Oct. 1985, at 91, 101.

> "[W]hen the judiciary imposes upon democracy [i.e. upon the legislature] limits not to be found in the Constitution, it deprives Americans of a right that is found there, the right to make the laws to govern themselves. As courts intervene more frequently to set aside majoritarian outcomes, they teach the lesson that democratic processes are suspect, essentially unprincipled and untrustworthy". 84/

Thus, in a 1985 article, 85/ Judge Bork strongly criticized what he viewed as unwarranted judicial legislating by "non-interpretivist" judges: "[w]hat fuels the non-interpretivist impulse in the first place is a desire to change society in ways that legislatures refuse". 86/ Of course, that criticism necessarily assumes the correctness of Judge Bork's literalist theory of constitutional interpretation. If, for example, a particular constitutional provision is properly interpreted to guarantee a particular right, there is no need for legislative intervention. The legislature's failure to act is then not a "refusal" but rather a recognition that the underlying constitutional provision suffices. 87/

84/ Bork, Judicial Review and Democracy, Society, Nov./Dec. 1986, at 7.

85/ Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383 (1985).

86/ Id. at 388.

87/ The Court has held that certain rights arise directly from the Constitution. See Bivens v. Six Unknown Federal

If anything is consistent about Judge Bork's philosophical views, it is the strong terms in which he expresses them. As we have already demonstrated, the force with which Judge Bork applies his philosophy to civil rights issues has led him to take positions rejected by the Court's strongest advocates of "judicial restraint". We now consider Judge Bork's judicial philosophy in the context of certain civil liberties issues.

III. Judge Bork on Civil Liberties

Judge Bork's philosophy has lead him to impose extreme limitations on civil liberties. For example, Judge Bork rejects all Supreme Court jurisprudence on individual and family privacy, while taking a uniquely selective view of what rights are protected by the First Amendment. In addition to their independent significance, these positions are important because they further illustrate the workings

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Narcotics Agents, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678, 684 (1946) ("It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . . Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury").

of Judge Bork's philosophy as applied to civil liberties which are crucial to protection and advancement of civil rights.

A. Privacy and the Family. In Judge Bork's constitutional writings, he has repeatedly criticized a body of Supreme Court decisions that protect the private lives of individuals from government intrusion. 88/ This body of decisions has been based, in part, on the Supreme Court's conclusion that the Constitution creates "a private realm of family life which the state cannot enter." 89/ The Court recently described this doctrine as follows: "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." 90/

The Court has applied this doctrine in a variety of contexts. For example, the Court has concluded that the government may not deny parents the right to have their

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88/ See, e.g., Neutral Principles, supra note 5, at 11-12.

89/ Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

90/ Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

children educated in private (or parochial) schools (Pierce v. Society of Sisters); 91/ that a state may not prevent parents from having their children taught foreign languages (Meyer v. Nebraska); 92/ that a state may not prohibit the use of contraceptives by married couples (Griswold v. Connecticut); 93/ that the government may not bar extended families (such as grandparents and grandchildren) from living together in particular zoning areas (Moore v. City of East Cleveland); 94/ and that a state's power to sterilize convicts is severely limited (Skinner v. Oklahoma). 95/ The Court has also found that the ability of unmarried persons to obtain contraceptives, and the opportunity to obtain an abortion, are entitled to special constitutional protection on similar privacy grounds. 96/

91/ 268 U.S. 510 (1925).

92/ 262 U.S. 390 (1923).

93/ 381 U.S. 479 (1965).

94/ 431 U.S. 494 (1977).

95/ 316 U.S. 535 (1942). Skinner relied on the Equal Protection clause to strike down the Oklahoma sterilization statute, reasoning that "legislation that involves one of the basic civil rights of man" must be subjected to strict scrutiny under that clause. Id. at 541.

96/ See Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services, 431 U.S. 678 (1977).

Members of the Supreme Court have disagreed to some extent about both the specific constitutional source of this protection, and about precisely what areas it covers. But there has been a striking degree of consensus on the Court that, although the Constitution does not explicitly spell out the right of privacy, it does protect individuals from interference by the government in key aspects of their personal lives. Indeed, Justice Harlan--who was well known for his commitment to judicial restraint 97/--agreed with the majority in Griswold that the Connecticut statute barring use of contraceptives was unconstitutional. 98/ In an opinion that anticipated the result in Griswold, Justice Harlan described the Connecticut law as "an intolerable and unjustifiable invasion of privacy in the most intimate concerns of an individual's personal life." 99/ Similarly, Justice Frankfurter, whose commitment to judicial restraint

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97/ Cf. New Philosophy, supra note 60, at 140 (praising Justice Harlan).

98/ See 381 U.S. at 499-502 (Harlan, J., concurring). Justices Black and Stewart dissented. See id. at 507-27 (Black, J., dissenting); id. at 527-31 (Stewart, J., dissenting).

99/ Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting). In Poe, the majority declined to review the merits of the Connecticut law because it concluded that the case was not justiciable.

is equally familiar, joined the majority opinion in Skinner invalidating the Oklahoma sterilization statute--an opinion that Justice Harlan likewise endorsed. 100/

Judge Bork rejects this entire body of constitutional jurisprudence: he has repeatedly criticized, not merely specific applications of this doctrine, but the doctrine itself. In his 1971 Indiana Law Journal article, Judge Bork concluded that virtually all of the above decisions were "wrongly decided" or "improper"--including Meyer v. Nebraska, Skinner v. Oklahoma, 101/ Griswold v. Connecticut, and Pierce v. Society of Sisters. 102/ Judge Bork has reiterated his criticism of Griswold in a recent interview. 103/

100/ Skinner v. Oklahoma, 316 U.S. 535 (1942).

101/ Neutral Principles, supra note 5, at 11-2. In his 1971 article, Judge Bork described Skinner and Griswold as "improper and intellectually empty." Id. at 12. More recently, Judge Bork referred to Skinner as "perhaps aberrational." The Human Life Bill: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 97th Cong., 1st Sess. 315 (1981) (statement of Robert H. Bork).

102/ Neutral Principles, supra note 5, at 11-12. Judge Bork also wrote that "perhaps Pierce's result could be reached on acceptable grounds", id. at 11, without stating what those grounds were.

103/ McGuigan, supra note 83, at 97 ("I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision").

Judge Bork's central argument is that the privacy and family decisions do not deal with rights at all but merely reflect "the Justice's personal beliefs about what interests or gratifications ought to be protected." 104/ Judge Bork contends that the principle of majority rule embodied in the Constitution--and the limited role of the judiciary--means that the will of the legislative majority must govern "unless it clearly runs contrary to a choice made in the framing of the Constitution." 105/

Judge Bork's concern about the potential for excessive judicial interference with legislative decisions is not, of course, a new one: that issue has been a source of serious concern at least since the beginning of this century. 106/ Nor has this concern escaped the attention of many thoughtful Justices--including Justice Powell--who has concluded that the history of the era of judicial activism associated with Lochner v. New York 107/ "counsels caution and restraint. It does not counsel abandonment" of rights

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104/ Neutral Principles, supra note 5, at 10-12.

105/ Id at 10-11.

106/ See e.g., Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting).

107/ 198 U.S. 45 (1905) (striking down economic legislation).

of privacy through a refusal to employ judicial intervention. 108/

Indeed, Justice Holmes, who criticized the majority in Lochner, 109/ joined the majority in Pierce. 110/ In addition, Justice Harlan rejected the view that the protection of individual privacy represents the arbitrary imposition of judicial will. In Poe v. Ullman, Justice Harlan noted that while "due process has not been reduced to any formula . . . it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." 111/ Justice Harlan went on:

> "If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically

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108/ Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (Powell, J.) (plurality opinion).

109/ 198 U.S. at 74-76.

110/ 268 U.S. 510.

111/ Poe v. Ullman, 367 U.S. at 542 (Harlan, J., dissenting). Justice Harlan viewed the right to privacy as an aspect of the due process clause.

> departs from it could not long survive, while a decision which builds upon what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> . . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points picked out in terms of the taking of property; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantially arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. Skinner v. Oklahoma . . . ." 112/

There is thus strong support, even from a leading advocate of "judicial restraint," for the constitutional protection of individual and family privacy that Judge Bork has rejected.

B. Freedom of Speech. Judge Bork has also written about the protection of freedom of speech under the First Amendment. 113/ His approach to freedom of speech is based on his view that the central value of the First

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112/ Id. at 542-43.

113/ See, e.g., Neutral Principles, supra note 5, at 20-35; Bork, The First Amendment Does Not Give Greater Freedom to the Press than to Speech, Center Magazine, March/April 1979.

Amendment is the protection of political speech. 114/ At one time, Judge Bork took the position that "[c]onstitutional protection should be accorded only to speech that is explicitly political," and should be denied to "scientific, literary," and other forms of expression. 115/ Judge Bork has at least partially abandoned that view. 116/ However, Judge Bork has advocated--and to our knowledge never retracted--a view about the protection of political speech that departs from the views of the Supreme Court over the past several decades.

The Court has used a variety of formulations to articulate the extent of protection that the Constitution affords to political speech, and particularly to speech

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114/ See, e.g., Neutral Principles, supra note 5, at 20-21.

115/ Id. at 20.

116/ In a brief statement in 1984, Judge Bork said that he had "long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. . . . I continue to think that obscenity and pornography do not fit this rationale for protection." See Letter of Robert H. Bork, 70 A.B.A.J., Feb. 1984, at 132.

It is unclear precisely how far Judge Bork would go in protecting non-political speech, although while on the bench he has followed (and has not criticized) Supreme Court decisions holding that commercial speech is entitled to protection. See FTC v. Brown & Williamson, 778 F.2d 35, 43 (1985).

advocating the violation of law. 117/ Justices have often disagreed with one another about the precise details of the protection the Constitution affords in this area, but a strong consensus has developed that the First Amendment affords significant protection to all forms of political speech, including advocacy of violation of laws.

During the 1910s and 1920s, Justice Holmes, joined by Justice Brandeis, laid the foundation for the Supreme Court's contemporary approach in this area. Through majority opinions, concurrences, and dissents, they argued that the First Amendment permits the suppression of political speech only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 118/ As Justice Brandeis said in his dissent in Whitney v. California: "[t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if

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117/ See, e.g., Hess v. Indiana, 414 U.S. 105 (1973); Dennis v. United States, 341 U.S. 494 (1951).

118/ Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.); see Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624-29 (1919) (Holmes, J., dissenting).

free speech is practiced . . . . [E]ven advocacy of violation [of law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon." 119/

During the succeeding decades, the Supreme Court gradually recognized that the First Amendment's protection of political advocacy was at least as great as that recognized by Justices Holmes and Brandeis. These developments were summarized in the Supreme Court's unanimous opinion in Brandenburg v. Ohio, in which the Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 120/ Since that time, the Supreme Court has twice reaffirmed Brandenburg--most recently by a 7-0 vote in NAACP v. Claiborne Hardware Co. 121/

119/ Whitney, 274 U.S. at 376 (Brandeis, J., concurring).

120/ Brandenburg, 395 U.S. at 444, 447 (1969).

121/ 458 U.S. 886 (1982). Then-Justice Rehnquist concurred in the judgment, while Justice Marshall did not participate in the case. [Footnote continued on next page.]

In his academic writing, Judge Bork stands well apart from this consensus. He has argued that there should be "no constitutional protection for any speech advocating the violation of law." 122/ Judge Bork contended that "[a]dvocacy of law violation is a call to set aside the results that political speech has produced," and therefore does not qualify for First Amendment protection. 123/ Judge Bork has gone so far as to characterize Justices Holmes and Brandeis' groundbreaking opinions in Gitlow, Whitney, Schenck, and Abrams as "deficient in logic and analysis as well as in history". 124/

The Court also applied Brandenburg in Hess v. Indiana, 414 U.S. 105 (1973), in which it held that a state may not punish mere advocacy of illegal action at some indefinite future time, but only language "likely to produce . . . imminent disorder." Hess, Id. at 109 (1973) (emphasis in original). Although three Justices dissented in Hess, they did so based on their different view of the facts; the dissenters themselves relied on a formulation very similar to Brandenburg. See Hess, 414 U.S. at 111 (Rehnquist, J., dissenting) ("[t]he majority concludes that the advocacy was not directed towards inciting imminent action. But . . . there are surely possible constructions of the [defendant's] statement which would encompass more or less immediate and continued action against the harassed police.").

122/ Neutral Principles, supra note 5, at 31 (emphasis added).

123/ Id.

124/ Id. at 23.

In his 1971 article, Judge Bork did not limit his proposed doctrine to advocacy of violent overthrow of the government, 125/ or to advocacy that interferes with national security or a war effort. Because the rule he proposed has no exceptions or qualifications, it would have permitted states or cities to punish the Rev. Martin Luther King, Jr., and other proponents of nonviolent civil disobedience, merely for having advocated peaceful violation of Jim Crow laws in speeches and articles. In the place of judicial monitoring to protect such speech, Judge Bork advocates that the legislature and the executive should decide whether or not "to permit some rhetoric about law violation . . . ." 126/

Even such advocates of "judicial restraint" as Justices Holmes, Frankfurter, and Harlan have not embraced this position. Justice Holmes' views, as set forth in Gitlow and other cases, have already been discussed. Justice Harlan joined in the Court's unanimous opinion in Brandenburg, requiring "incitement of imminent action." And although Justice Frankfurter allowed some restrictions of

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125/ Judge Bork discusses the advocacy of forcible overthrow of the government as a separate issue. See id. at 31.

126/ Id. at 33.

organized advocacy of the violent overthrow of the government, 127/ there are strong indications that he would, at a minimum, view the theoretical advocacy of nonviolent disobedience to law as constitutionally protected. 128/ Thus, Judge Bork's stated views represent an extraordinarily narrow reading of the range of political speech protected by the First Amendment.

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127/ See Dennis v. United States, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring).

128/ Justice Frankfurter joined in Justice Harlan's opinions narrowly construing the Smith Act, which were based on the assumption that Congress did not intend to "disregard a constitutional danger zone so clearly marked." See, e.g., Yates v. United States, 354 U.S. 298, 319 (1957); Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961). In those opinions, the Court held that the Act did not reach "advocacy . . . of forcible overthrow as an abstract principle," Yates, 354 U.S. at 318, and concluded that it did not reach the mere distribution of general literature and resolutions calling for the overthrow of the government. Scales, 367 U.S. at 232-33. See T. Emerson, The System of Freedom of Expression 122 (1970) ("There is little doubt, however, that the distinction between 'advocacy of action' and 'advocacy of ideas' was considered by the [Yates] Court to have constitutional dimensions".).

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STATEMENT OF BENJAMIN HOOKS, CHAIRPERSON

OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

on The Nomination of Robert H. Bork

to the Supreme Court of the United States

submitted to the Committee on the Judiciary, U.S. Senate,
October 1987

The Leadership Conference on Civil Rights, a coalition of 185 national organizations, appreciates this opportunity to present a statement for the record of the Senate Judiciary Committee regarding the nomination of Robert Bork to be Associate Justice of the Supreme Court.

Our statement is brief because the record is now long and our point can be made briefly: Judge Bork's crabbed and grudging view of the Constitution allows that great charter no life, and his mechanical application of that view puts him with startling regularity in opposition to the claims of minorities and women. If he were to be confirmed and came to muster a majority, justice would less often be achieved, respect for the Court as the ultimate protector of our rights and liberties would diminish, and the nation's slow but real progress toward a more inclusive democracy and greater equality of rights would be drastically slowed, if not wholly interrupted.

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This is, in short, the civil rights vote not only of this Congress but perhaps for many Congresses to come. We urge Senators to cast their votes for continued development of civil rights by casting those votes against confirmation of Judge Bork.]

We believe that a study of the Bork record -- his many statements before he became a judge and in extra-judicial forums since that time, his rulings in hotly contested cases that have come before him (few in number, and none involving constitutional issues), and his statements on civil and women's rights before this Committee -- reveals a consistent pattern of opposition to these rights and to the remedies needed when rights are violated. We do not in any way assert or imply that Judge Bork is racist or sexist in purpose or motive. For us the crucial point is that Judge Bork's approach to constitutional interpretation and the interpretation of statutes has led -- and we must conclude will lead -- to rejection of the claims to equality of minorities and women. The evidence for this conclusion has been presented repeatedly and eloquently in the testimony received by the Committee, in a pattern begun by the remarkable opening statements and responses to Committee questions of Secretary William Coleman and Congresswoman Barbara Jordan. We commend to all Senators a reading of the noteworthy record compiled by the Committee, and we append to this statement copies of earlier expressions by the Leadership Conference on the Bork nomination. We pause here only to note one piece of the testimony of Judge Bork that encapsulates the approach he brings to the great issues of race in American life: his testimony concerning the case in which the Supreme Court struck down racial segregation in the public schools of the District of Columbia, Bolling v. Sharpe.

Because the District of Columbia is not a State and was in 1954 governed by federal law, the equal protection clause of the Fourteenth Amendment was inapplicable in Bolling v. Sharpe. The Fifth Amendment of course was, and the Court's unanimous opinion concluded that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." (347 U.S. 497, 500.) In reaching that conclusion, the Court wrote:

> "The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."
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> * * * * *
>
> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.
>
> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." (347 U.S. at 499-500, footnotes omitted.)

In discussion with Senator Arlen Specter during this Committee's hearing, Judge Bork made clear that he did not find Bolling satisfactory. He differentiated between Brown and Bolling because of the inapplicability of the Fourteenth Amendment in the latter and the lack of equal protection language in the Fifth Amendment. "I think that constitutionally that is a troublesome case" said Bork of Bolling to Senator Specter (Transcript, Sept. 16, p. 150). Taken

back to the subject the next day by Senator Charles Grassley, presumably because what he said on the 16th was so shocking, Judge Bork suggested without being definitive that perhaps Bolling could be justified on freedom-of-association grounds under the First Amendment, but could conclude only that "to say that the reasoning of any case seems not adequate is not to say you want to overrule it". (Transcript, Sept. 17, p. 165). In examining a nomination to the Supreme Court one is of course looking to the future, asking not only whether a Justice Bork would seek to overrule Bolling or any other particular case, but also and more basically, what that Justice would do in the next case that came along presenting a different set of facts. In the light of the quoted statements of Bork on Bolling , no one could be confident that a Justice Bork would strike down federally-compelled racial discrimination in any other situation.

Judge Bork's approach to Bolling is a telling example of the reasons why he should not be confirmed as an Associate Justice of the Supreme Court. Our nation deserves a nominee who understands and accepts the role of the Court as protector of our rights and liberties.

Leadership Conference on Civil Rights

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9/17/87

STATEMENT OF THE
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

For the last three days the Senate Judiciary Committee has heard from a nominee who offers views significantly different from the record of the views expressed by Judge Bork prior to September 15, 1987.

What the New Judge Bork now says differs significantly from the Old Judge Bork on free speech, privacy, contraception, and discrimination on the basis of sex. The New Judge Bork has made statements in favor of the civil rights laws, and against restrictive covenants and forcible sterilization, which the Old Judge Bork, in all of his voluminous writings and speeches, never wrote or uttered.

We oppose the confirmation of either the New Judge Bork or the Old Judge Bork. Even the constitutional positions of the New Judge Bork pose an unacceptable risk to many of the rights which Americans widely regard as their birthright.

But we will urge the Senate, in evaluating this nomination, to place primary emphasis on the positions taken by Judge Bork prior to the date on which he was nominated for the United States Supreme Court. We believe that those statements, made when Judge Bork had little incentive to recast his views in a manner likely to be more palatable to the Senate, are a truer indication of what Judge Bork would do if he became a member of the Supreme Court.

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A number of organizations in the Leadership Conference do not take positions supporting or opposing confirmations of federal officials, and for that reason, do not join us in this statement. The Anti-Defamation League, the U.S. Catholic Conference, the League of Women Voters, and the American Jewish Committee have specifically requested that they not be listed as concurring in this statement.

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BORK v. BORK

An analysis of the Bork record prepared by

The Leadership Conference on Civil Rights

On National League of Cities v. Usery and Garcia v. San Antonio

THE NEW BORK

Senator Grassley. Well, let me ask you this: Would you disagree with the Supreme Court 1985 decision in Garcia v. San Antonio?

Judge Bork. Well, I should not speak to that, for two reasons. One is I do not know, and two is I should not speak to it even if I did know. . . I really should not express an opinion on Garcia and National League of Cities out of propriety and also because I really have not got an opinion.

9/16 transcript, pp. 101-102.

THE OLD BORK

"Looking back, it seems that National League of Cities v. Usery was correctly decided."

Attorney General's Conference,
January 1986, pp. 10-11

Bork Abandons 1971 View that First Amendment Covers Only Political Speech

THE NEW BORK

The Chairman. "When did you drop that idea?"
Judge Bork. "Oh, in class right away."

9/16 transcript, p. 96

"I have since been persuaded--in fact I was persuaded by my colleagues very quickly--that a bright line made no sense."

9/15 transcript, p. 186

THE OLD BORK

"There is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation."

Speech, University of Michigan, 1979, pp. 8-9

On Brandenburg v. Ohio

THE NEW BORK

"The Supreme Court has come to the Brandenburg position--which is okay; it is a good position."

9/16 transcript, p. 115

". . . on the subject of speaking, advocating political disobedience or civil disobedience or advocating overthrow, I am about where the Supreme Court is."

9/16 transcript, p. 129

THE OLD BORK

"Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment."

Speech, University of Michigan, 1979, p. 21

On restricting Equal Protection Clause only to specified groups

THE NEW BORK

"I objected to when the Supreme Court was using a method of saying this group, illegitimate children, aliens, is in; this group, somebody else, is out. . . It is much better to proceed under the reasonableness test. . . Any person is covered. That means everybody is covered, men, women, everybody."

9/16 transcript, pp. 73-74

THE OLD BORK

"Cases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the . . . equal protection clause."

1971 Indiana Law Review article
p. 11

"I think the Equal Protection Clause probably should have been kept to things like race and ethnicity."

1987 Worldnet Interview, p. 12

Bork Objects to Special Scrutiny for Sex Discrimination

THE NEW BORK

"At the time when I wrote about the equal protection clause, the Court had never extended the clause to women."

9/15 transcript, p. 172

THE OLD BORK

"I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."

Worldnet Interview, 1987, p. 12

"In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a judge making up what more it's about. And I don't think he should."

Comment, Aspen Institute,
August, 1985

Adapting the Constitution to Contemporary Views About Women

THE NEW BORK

"As the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seemed outmoded stereotypes and they seem unreasonable and they get struck down. That is the way a reasonable basis case test should be applied."

Tuesday, transcript, p. 211

THE OLD BORK

"There being no criteria available to the court, the identification of favored minorities will proceed according to current fads in sentimentality. . .This involves the judge in deciding which motives for legislation are respectable and which are not, a denial of the majority's right to choose its own rationales. . . . It is not explained why courts are entitled to tell the legislature their moral judgements are really prejudices and that their perceptions of social reality are skewed."

Speech, Catholic University, pp. 18-19

Can Roe v. Wade Be Justified on Some Constitutional Theory?

THE NEW BORK

"There may be some way to do it. I have heard fairly strong moral arguments for abortion, just as I have heard fairly strong moral arguments against it. Whether those moral arguments could be rooted to the constitutional material, I really do not know."

9/16 transcript, p. 208

THE OLD BORK

"Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."

1981 Hearing on the Human Life Bill, pp. 310, 315

The decision in Roe "could not have been reached by interpretation of the Constitution."

Speech, Catholic University, 1982, p. 4

"I don't think it's any of the court's business to intrude. I just don't think there was anything in the Constitution about it."

Washington Post Interview, conducted 1984, printed 1987

On incorporating the Bill of Rights into the Constitution

THE NEW BORK

". . . there's been more evidence which tends to show that incorporation was intended, and it is very clear that. . . Congressman Bingham, who wrote much of the clause and managed it in the House; and Senator Howard, . . . who was the member of the committee that drafted it and was the floor manager in the Senate, both of them clearly intended to incorporate not just the Bill of Rights, but any personal protection to be found in the . . . the original Constitution. So there is some pretty good historical evidence that it was intended."

Federal Information Systems, Transcript, p. 2-1, Sept. 18, 1987

THE OLD BORK

". . . the incorporation of the Bill of Rights, which was applied only against the federal government, through the Fourteenth Amendment to apply against the the states, was probably a Supreme Court innovation which the ratifiers had not intended."

Worldnet Interview, June 10, 1987, pp. 4-5

On the Poll Tax

Judge Bork stated on September 8 that he would have agreed with the Supreme Court decision in Harper v. Virginia Bord of Elections, holding the poll tax unconstitutional, if there had been proof the Virginia poll tax was adopted for a discriminatory purpose. But, he asserted, there was no indication that there was any such purpose behind the Virginia poll tax.

The Supreme Court in Harper made an express finding that the "Virginia poll tax was born of a desire to disenfranchise the Negro." 383 U.S. 663, 666 (1966)

Harper cited as authority for this finding the Supreme Court's 1965 decision in Harman v. Forssenius, 380 U.S. 528 (1965). Harman quoted the following statement by the original sponsor of the Virginia poll tax:

> "Discrimination! Why, that is precisely what we propose; that exactly, is what this Convention was elected for -- to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate."
>
> 380 U.S. 543. (1965)

On the difficulty of Deciding OCAW v. American Cyanamid

THE NEW BORK

The case involved a "wrenching decision for the women and for us." Friday afternoon, 3:45.

THE OLD BORK

"Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy." 741 F. 2d 444, 445 (D.C. Cir. 1984) (emphasis added)

BORK V. BORK -- FRIDAY SUPPLEMENT

Prepared by the

Leadership Conference on Civil Rights

(1) Does the Fourteenth Amendment Incorporate the Bill of Rights

The New Bork

" . . . there's been more evidence which tends to show that incorporation was intended, and it is very clear that . . . Congressman Bingham, who wrote much of the clause and managed it in the House; and Senator Howard, . . . who was the member of the committee that drafted it and was the floor manager in the Senate, both of them clearly intended to incorporate not just the Bill of Rights, but any personal protection to be found in the . . . the original Constitution. So there is some pretty good historical evidence that it was intended."

Federal Information Systems
Transcript, p. 2-1, Sept.
18, 1987

The Old Bork

" . . . the incorporation of the Bill of Rights, which was applied only against the federal government, through the Fourteenth Amendment to apply against the states, was probably a Supreme Court innovation which the ratifiers had not intended."

Worldnet Interview, June 10,
1987, pp. 4-5

(2) The Poll Tax

The New Judge Bork

Judge Bork stated this morning that he would have agreed with the Supreme Court decision in Harper v. Virginia Board of Elections , holding the poll tax unconstitutional, if there had been proof the Virginia poll tax was adopted for a discriminatory purpose. But, he asserted, there was no indication that there was any such purpose behind the Virginia poll tax.

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380 U.S. 543.

(3) Difficulty of Deciding OCAW v. American Cyanamid

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THE BORK RECORD ON LABOR

The labor record of Robert Bork, while not long, is consistent: where a case or an issue presented a conflict between the interests of workers or their unions, on the one hand, and those of business, on the other and the solution was sufficiently difficult that the judges disagreed, Bork has supported the employer. Similarly, in cases involving the rights of public employees, Bork defers to the employer, the executive branch.

In Restaurant Corporation of America v. NLRB, 1/ Judge Bork would have overturned NLRB factual and legal judgments to uphold an employer's right to fire pro-union employees for union solicitation, even though the employer had consistently allowed other forms of solicitation.

In this case, although the employer had a rule prohibiting solicitation of any kind, it had permitted work-time solicitation for other purposes on many occasions. When an employee on a single occasion discussed the merits of unionizing with two fellow workers while he was off-duty and they were temporarily without tasks, the employee was discharged. Judge Bork found impermissible the Board ruling that the discharge was discriminatory and thus unlawful, because in his view whatever "minimal disruptive effect" the tolerated solicitations may have "would seem to be counter-balanced by an accompanying increase in employee morale and cohesion," in contrast to what Bork apparently views as the inevitable effect of union advocacy. Judge MacKinnon, writing for the majority on rehearing, termed

the Bork analysis "rooted in bald policy assertions", which are not the province of the reviewing court, and pointed out that Bork ignored the critical facts that the employer's no-solicitation rule was absolute, and the employee's single solicitation was even less disruptive than the only nominally disruptive permitted solicitations.

Prill v. NLRB 2/ presented to the court one of the striking anti-worker shifts in position of the NLRB after the Reagan appointees achieved control. In this case, a driver for a nonunion company refused to drive a company tractor-trailer after an accident caused by its faulty brakes. When Prill called the state police to have them perform a safety inspection, rather than following company orders to take the truck back out on the road, the company fired him. The NLRB reversed prior precedent that had given protection to workers who complained to state safety agencies about working conditions of common concern to other workers, and ruled that the National Labor Relations Act forbade it to extend such protection unless the worker in question expressly joined with others in rejecting unsafe work.

The court of appeals, 2:1, overturned the Board's decision as based on an erroneous view of the law. The majority concluded that the Board had erred in its view that the NLRA required its new rule. The majority "express[ed] no opinion as to the correct test of 'concerted activities'". That is a question that the statute commits to the Board in the first instance, to answer by exercising its statutory discretion to interpret the Act in light of the realities of the workplace.

Judge Bork voted to uphold the Board 's decision on the ground that it was "compelled" by the statute: no legally permissible rule could protect the activity for which Prill was discharged, in Bork's view.

Judge Bork has shown insensitivity to worker safety and health in other cases as well. In Simplex Time Recorder Co. v. Secretary of Labor, 3/ he joined a majority opinion that upheld administrative law judge findings of multiple safety violations by the employer concerning fire protection, and denied the Secretary's appeal from the ALJ's conclusion that the violations were nonetheless not "serious" -- thus warranting a more severe penalty --

even though a worker died in a fire. The dissenting judge wrote that the evidence of a serious violation was "compelling and essentially uncontradicted" and that the ALJ had erroneously required proof of too great a likelihood of causation. In Oil, Chemical and Atomic Workers Int'l Union v. American Cyanamid Co., 4/ at issue was an employer's policy of requiring female employees of child-bearing age to be sterilized or lose their jobs in its plant where there was so much lead in the air as to endanger fetal health. Judge Bork wrote for a unanimous panel (Bork, Scalia and a senior federal district judge) that this policy was outside the reach of the Occupational Safety and Health Act. Bork insisted that the sterilization option of the employer's "fetus protection policy" is not a "hazard" of employment within the meaning of the Act because a "policy" is not the same thing as a chemical or other physical condition of the workplace.

In a judicial opinion concerned with union organizing efforts, Judge Bork essentially mocked the idea that employers use delay in legal process to frustrate union organizing (Amal. Clothing Workers v. NLRB, 5/ where he ignored an empirical study that refuted his view, as well as the common sense of the situation, while arguing that delay might favor organizing unions just as much as employers resisting organization).

Prior to being named a judge in 1982, Judge Bork had written in opposition to organized labor's goals, condemning minimum wage laws 6/ and citing the power of municipal unions to extract supposedly unreasonable wage rates as an illustration of a major "structural defect" in our system of "representative government".7/

In a case involving public employee bargaining, Judge Bork joined a majority opinion affirming a broad reading of a federal employer's right to take unilateral action (AFGE v. FLRA 8/). And in Reuber v. U.S., 9/ a case involving a private sector employee allegedly discharged at the urging of the government in retaliation for his free speech activity, Bork urged in a concurring opinion that remedies should be severely limited in such a situation (which typically involves a public, not private sector employee), going so far as to question a leading Supreme Court case (Mt. Healthy v. Doyle, 429 U.S. 24 (1977) on the issue whether reinstatement should be available as a remedy when an employee is unconstitutionally discharged.

And in Meadows v. Palmer, 10/ where an employee under the federal

civil service laws challenged his reassignment to a position with no meaningful work to do, Bork wrote for the majority that the employee could not complain that he had been reduced in rank because there was no technical change in his status. The dissenting judge termed the majority's ruling "promot[ion of] a mischievous doctrine that can erode the whole concept of civil service". In a case that pitted federal employees against the union that represented them, where there was no clear employer interest, Bork wrote the majority opinion rejecting the federal labor relations agency's interpretation of the statute involved and rejecting the employees' claim (NTEU v. FLRA 11/). In the one public employee case in which Bork supported an employee challenge to government as employer, he wrote for a majority reversing a federal agency discharge decision without reaching the merits, and sending the case back on procedural grounds (York v. Merit System Protection Board 12/).

Finally, in the lead case concerning sexual harassment as a violation of the federal equal employment opportunity law, the Vinson case, 13/ Judge Bork took positions rejected by the majority of the D.C. Circuit and then by a unanimous Supreme Court. A panel of the court of appeals not including Bork ruled that a female employee subjected to demands for sex and other harassment by her supervisor could sue for sex discrimination. The employer's petition for rehearing was denied by the full court. Judge Bork dissented, expressing the view that an employer should be allowed to show that a sexual relationship was "voluntary", which would be a complete defense, and questioning whether sexual harassment constituted a violation of Title VII at all. This Bork position was rejected by a unanimous Supreme Court. Chief Justice Rehnquist wrote that the proper test in such a case was whether the employer had created "an intimidating, hostile, or offensive working environment", and with respect to this asserted defense, that the "correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation" in sexual activity was "voluntary".

1/ D.C. Cir. #84-1475, opinions on rehearing filed August 25, 1987. Bork has been on both the prevailing and losing side of this case. He wrote the initial opinion for a 2:1 majority; rehearing was granted; and, with a substitution in the panel membership after Judge Scalia went on the Supreme Court, the decision was reversed 2:1, with Judge Bork now in dissent.

2/ 755 F.2d 941, cert. denied, 106 S. Ct. 313 (1985).

3/ 766 F.2d 575 (1985).

4/ 741 F.2d 444 (1984).

5/ 736 F.2d 1559 (1984).

6/ Bork, Capitalism and The Corporate Executive, at 4 (1977).

7/ American Enterprise Inst., Taxpayers' Revolt: Are Constitutional Limits Desirable? (1978) (Panel Discussion).

8/ 778 F.2d 850 (1985).

9/ 750 F.2d 1039 (1984).

10/ 775 F.2d 1193 (1985).

11/ 800 F.2d 1165 (1986).

12/ 711 F.2d 401 (1983).

13/ Vinson v. Taylor, 760 F.2 d 1330 (1985) (denial of reh. en banc of 753 F.2d 141), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

Leadership Conference on Civil Rights

2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
202/667-1780

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SUMMARY OF SOME OF THE MAJOR ARGUMENTS AGAINST THE NOMINATION OF ROBERT BORK

I. The primary reason for opposing nominee Bork is that he has aligned himself against most of the landmark decisions protecting civil rights and individual liberties that the Supreme Court has rendered over the past four decades.

A. Race Discrimination

Bork finds insupportable the Court's 1948 decision in Shelley v. Kraemer, (334 U.S. 1) holding that judicial enforcement of racially restrictive covenants violates the 14th Amendment. Bork, Neutral Principles and some First Amendment problems, 47 Indiana Law Journal 1, 15-17. He opposed passage of the provisions of the 1964 Civil Rights Act barring discrimination in public accommodations (though in his confirmation hearings in 1973 he said he had changed his mind), Bork, Civil Rights - A Challenge, New Republic Aug. 31, 1963. He thought the Supreme Court was wrong in upholding provisions of the 1965 Voting Rights Act banning the use of literacy tests under certain circumstances. Katzenbach v. Morgan, 384 U.S. 641 (1966), Bork, Constitutionality of the President's Busing Proposals, 1, 9-10 (American Enterprise Institute 1972).

In 1972, he was one of only two law professors to testify in support of the constitutionality of legislation drastically curtailing school desegregation remedies that the Supreme Court had said were constitutionally necessary to cure violations of the 14th Amendment. Hearings of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Educational Opportunity Act of 1972. 92d Congress, 2d Session (1972). Hundreds of law professors said the legislation was unconstitutional. As Solicitor General, Bork continued to oppose school desegregation remedies, once being overruled by Attorney General Levi in his effort to bring the Boston school case to the Supreme Court to curtail remedy. See Orfield, Must We Bus? pp. 352-353 (Brookings Institution 1978). Washington Post, May 30, 1976. Bork also unsuccessfully opposed in the Supreme Court fair housing remedies for low income black citizens even though the federal government had participated in the discrimination. Hills v. Gautreaux, 425 U.S. 284 (1976). Since then he has made clear his opposition to affirmative action remedies for employment discrimination.

B. Other invidious forms of discrimination

He has criticized as "improper and intellectually empty" a 1942 Supreme Court decision striking down an Oklahoma law that provided for the sterilization of some convicts. Skinner v. Oklahoma 316 U.S. 535 (1942). He opposed on the same grounds the Court's decision in 1968 holding unconstitutional a state law barring "illegitimate children" from bringing wrongful death actions. Levy v. Louisiana, 391 U.S. 68 (1968). See Indiana Law Journal at 12.

So, too, Bork says that the equal protection clause of the 14th Amendment was an improper ground for the Supreme Court's invalidation of West Virginia's poll tax law. Harper v. West Virginia Board of Elections, 383 U.S. 663 (1966), Senate Judiciary hearings on Confirmation of Robert Bork as Solicitor General, p. 17 (1973).

C. Restrictions on the Right to Vote

Apart from his opposition to the Court invalidating poll taxes and Congress barring literacy tests for voting, Bork has expressed vigorous opposition to the Supreme Court's decisions establishing the rule of "one man-one vote." Baker v. Carr, 369 U.S. 86 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). He finds no basis for these decisions in the 14th Amendment, Indiana Law Journal at 18-19. While he posits another possible theory (the guarantee of a republican form of government) he makes it clear that many malapportionment schemes now prohibited would be allowed under his theory. Id.

D. Restrictions on the Right to Privacy

Bork argues that the Constitution does not protect the right to privacy and that the entire line of Supreme Court decisions vindicating such rights is improper.

So he has inveighed on many occasions against the Supreme Court's decision invalidating a Connecticut law banning the use of contraceptives (even by married couples in the home) Griswold v. Connecticut, 381 U.S. 479 (1965), Indiana Law Journal at 9-11. And, as a judge, Bork wrote a major opinion supporting the authority of the military services to take action against homosexuals. Dronenberg Zech, ___F. 2d. ___ (D.C. Cir. 1984).

E. Restrictions on Free Speech

Bork argued in 1971 (and again in 1973) that "constitutional protection should be accorded only to speech that is explicitly political" (emphasis supplied) Indiana Law Journal at p. 20, 1973 confirmation hearings at 20-21. He would exclude from judicial protection not only obscenity or pornography but scientific and literary expression. While he has recently indicated that he has modified some of these views, he has still not made it clear whether he believes that artistic expression is protected.

II. The notion of Bork as apostle of judicial restraint is a myth. While Bork justifies his positions against individual rights and liberties as dictated

by "judicial restraint" and "neutral principles," he becomes a judicial activist on behalf of corporate, property or governmental interests he favors.

Although nominee Bork says that he would give great deference as a judge to the acts of legislators, one very notable exception is his blistering attack on the Supreme Court's decision in Katzenbach v. Morgan, upholding the authority of Congress to curb the use of literacy tests in order to protect the right to vote. Bork says that Section 5 of the 14th Amendment gives Congress power only to "implement" or enforce rights already declared, not to give new content to rights. It seems clear that were Bork on the Court, he would have exercised very little judicial restraint in the Morgan case.

Similarly, Bork has made it plain in his writings that he would give very little deference to the legislative intent of Congress in enacting the anti-trust laws. He prefers instead to give scope to those legislative objectives (e.g., economic efficiency) that he gives credence to and to disregard those (e.g., breaking up concentrations of economic power) that he opposes. As a judge, Bork has played fast and loose with Congressional intent in reviewing regulatory decisions in such areas as the environment and occupational safety (see Nader and Glitzenstein, N.Y. Times 7/13/87, p. A17).

In short, Bork is an advocate for judicial restraint in dealing with legislation he favors (mainly that restricting individual rights or liberties) but not in dealing with laws he opposes (mainly those impinging on property interests).

III. There is every reason to believe that nominee Bork would seek to reverse landmark decisions of the court if he became a justice. Where the court is closely divided, he may well succeed.

The lore is that once a nominee becomes a member of the Court he may pursue a course independent of the President who appointed him. If nothing else, it is agreed, the nominee is likely to respect settled law, even in cases where his views are opposed.

While that may be true of some nominees, it is hardly applicable to Bork. A member of the Supreme Court who simply disagreed with prior court rulings might nevertheless respect precedent. But Bork does not simply disagree -- he thinks past decisions are disastrous.

To wit: Baker v. Carr, Justice Warren was unable "to muster a single respectable supporting argument" (1971 Indiana Law Journal.

Skinner v. Oklahoma (and many other equal protection cases); "improper and intellectually empty." (1971 Indiana Law Journal).

Griswold v. Connecticut, "unprincipled" "utterly specious." (1971 Indiana Law Journal).

Holding such extreme views, Bork would be remiss if he did not seek to change these decisions. We have no reason not to take him at his word.

IV. Nominee Bork is an advocate of executive power at the expense of the power of the other branches. He would restrict access to the Courts of those who challenge the exercise of executive power.

In a 1971 law review article and again at his S.G. confirmation hearings, Bork defended the legality of President Nixon's actions in ordering the bombing of Cambodia as stemming from the "inherent power of the presidency." American Journal of International Law p. 79 (January 1971); 1973 Confirmation hearings at p.9.

In 1973, Bork as Acting Attorney General fired Watergate Special Prosecutor Archibald Cox. He did so in violation of the Department of Justice charter establishing the office, under which the special prosecutor could be removed only for "extraordinary impropriety."

In 1985, Bork as a federal judge dissented from a Court of Appeals decision upholding a congressional challenge to a pocket veto. He challenged the standing of Members of Congress to file the case. Barnes v. Kline, 759 F. 2d 21 (1985). While Bork's rationale was to avoid an expansion of judicial power, the impact of his views would be to expand executive power by preventing it from being checked by the legislative or judicial branches.

These views should be of special concern during a period when the Executive branch has acted in a lawless manner.

V. Senators should not censor themselves in deciding whether Robert Bork should be on the Supreme Court. They must decide on what they think is best for the country.

Students of the Constitution from liberals like Lawrence Tribe to conservatives like Philip Kurland, have made it clear that Senators may appropriately consider judicial philosophy or ideology in deciding whether to confirm a judicial nominee. The history of the nation is replete with such decision-making by Senators, from the rejection of George Washington's nominee John Rutledge for his opposition to the Jay treaty to Senator Thurmond's successful filibuster of the nomination of Abe Fortas to be Chief Justice.

Senators take the same oath of office as the President and judges -- to support and defend the Constitution. A Senator would be remiss in his obligation if he voted to confirm a nominee whose view of the Constitution would alter rights and immunities that the Senator believes are fundamental to our legal system.

Surveys have shown that the American public wants balance on the Supreme Court and does not want to return to an era in which government had unbridled power to curb individual rights and liberties.

Senators will serve neither the public nor the Constitution well if they do not take these factors into account in voting on the Bork nomination.

*****

The War on Children

36 Cooper Square, Room 7F, New York, N.Y. 10003 212-477-0748

September 19, 1987

Ms. Diana Huffman
Senate Judiciary
224 Dirksen Bldg.
U.S. Senate
Wash. D.C. 20510

RE: BORK HEARINGS--LEBRON vs. WMATA, 749F2D893 (BORK, J.)

I am the Michael Lebron in the above case that has been the subject of some discussion between Senator Orrin Hatch and Judge Bork during the hearings on Judge Bork's nomination to the Supremes. If it is possible, I would like the following read into the hearing's record:

I strongly object to the way my case has been used in an attempt to re-portray J. Bork as a moderate practitioner of judicial restraint. One reading of LEBRON vs. WMATA should make it apparent to most observers that this decision, while being consistent with long established constitutional principles, does not address many of the 1st amendment issues that civil libertarians are concerned about when confronted with the judge's nomination. For example, will artistic, sexual, seditious, and other forms of speech still receive protection?

While I am indeed grateful for what is otherwise a favorable decision, the well-worn truism bears repeating in this instance: that a stopped watch is right at least twice a day. And, with regard to the concept of judicial restraint, I personally have philosophical problems with the notion that anyone can approach our Constitution with a scientific formula, devoid of ideological bias. The committee should not be misled by the superficial ironies presented by my case.

Respectfully,

Michael Lebron

cc: NYT, Wash. Post,
Center for Constitutional
Rights, D. Weightman

AFFIDAVIT OF JOSEPH D. LEE

I, JOSEPH D. LEE, being duly sworn in accordance with law, hereby declare and state:

1. I am an attorney associated with the law firm of Munger, Tolles & Olson, in Los Angeles, California. I make this affidavit pursuant to a formal request made by the United States Senate Committee on the Judiciary in connection with its hearings concerning the nomination of the Honorable Robert H. Bork to the United States Supreme Court. I make this affidavit based on my personal knowledge; if called as a witness, I could and would testify competently to the matters stated herein.

2. Attached to this affidavit are copies of certain documents which I understand have been previously released publicly by Judge Bork, and which I obtained only by reason of such public release.

3. As I have previously advised representatives of the Department of Justice and of the Senate Judiciary Committee, I consider my communications with Judge Robb, to the extent they reflect judicial deliberations or activities, to be confidential. To the extent this affidavit addresses such matters, it does so only in view of Judge Robb's death in December 1985 and because those matters have previously been made public by Judge Bork or by the Honorable James F. Gordon, a United States District Judge for the Western District of Kentucky.

4. I graduated from Boalt Hall School of Law in May 1982 and, in early August 1982, began a one-year clerkship for

the Honorable Roger Robb of the United States Court of Appeals for the District of Columbia Circuit. A short while after starting my clerkship with Judge Robb, I was assigned responsibility for assisting Judge Robb in connection with the pending appeal in the Vander Jagt v. O'Neill case, later reported at 699 F.2d 1166 (1982). I was given a file on the case containing various documents that pertained to the pending appeal. I believe the file was given to me by one of Judge Robb's clerks from the 1981-82 court term, shortly before that individual ended his clerkship with Judge Robb. Among the documents in the file was a memorandum from Judge Robb to Judges Bork and Gordon setting forth the panel's intended disposition of the appeal. A copy of that memorandum is attached hereto as Exhibit A.

5. Judge Robb annually took a vacation in or near Falmouth, Massachusetts in the late summer. In 1982, to the best of my recollection, Judge Robb left for that vacation at roughly the beginning of September, and did not return to his chambers until around mid-October. During this vacation, Judge Robb fell and broke a hip, requiring his hospitalization in or near Falmouth.

6. On or about September 17, 1982, Judge Bork delivered to Judge Robb's chambers a proposed panel opinion in the Vander Jagt case. With the proposed opinion was a short memorandum from Judge Bork, a copy of which is attached hereto as Exhibit B.

7. Upon reviewing Judge Bork's proposed opinion, I was surprised to learn that it disposed of the case on standing

grounds, and seemed to hold that the D.C. Circuit's earlier opinion in Riegle v. Federal Open Market Committee, 656 F.2d 873 (1981), had been overruled by the United States Supreme Court's decision in the Valley Forge Christian College case. It was my expectation, based on a review of Judge Robb's file on the case, that the draft opinion would follow the analysis set forth in Riegle.

8. After reviewing the draft opinion, I called Judge Robb to discuss the case. I stated that Judge Bork had circulated a proposed panel opinion, and that I was surprised to see that the proposed draft (1) disposed of the case on standing grounds and (2) rather than relying on Riegle, suggested that this decision had been overruled. Judge Robb expressed considerable surprise and asked what Judge Bork had said regarding the change in rationale; I replied that his cover memorandum had not referred to the change. Judge Robb then inquired whether either Judge Bork or his clerks had provided a verbal explanation of the change in rationale, and I again replied in the negative. Although I do not recall Judge Robb's words at this point, I had the firm impression that he was both surprised and angered by these events. It was clear to me that he had not expected the draft opinion to dispose of the case on standing grounds or to suggest that Riegle was no longer good law.

9. At or shortly after the time I had the foregoing conversation with Judge Robb, I received a telephone call from David Tachau, then a law clerk to Judge Gordon. Mr. Tachau asked

Jaqt to dispose of the case on standing grounds, and whether Judge Robb had agreed to such a change in rationale. I replied in the negative. I believe that Judge Gordon asked to come on the line during this or a later conversation with Mr. Tachau, and asked me to confirm that Judge Robb had not agreed to dispose of the Vander Jaqt opinion on standing grounds. I did so.

10. I have no personal knowledge of whether Judge Robb and Judge Bork met after the panel conference in March 1982 to discuss disposition of the appeal, or of whether in that meeting Judge Robb agreed to change the rationale for the Vander Jaqt opinion to one of standing. There was nothing in Judge Robb's file reflecting that such a meeting occurred, or that there would be any such change in rationale. Nor did Judge Robb and I ever directly discuss whether such a meeting took place or whether he had agreed to change the rationale for the Vander Jaqt opinion. The first I heard about such matters was upon reviewing a memorandum from Judge Bork to Judges Robb and Gordon. A copy of that memorandum is attached hereto as Exhibit C.

11. The memorandum attached hereto as Exhibit C seems to reflect a conversation between Judge Robb and Judge Bork, after circulation of Judge Bork's proposed opinion, in which Judge Robb reportedly stated (1) that he did not recall an earlier meeting with Judge Bork to discuss the Vander Jaqt case, and (2) that he did not doubt that such a meeting took place. I have no personal knowledge regarding this second conversation between Judges Robb and Bork.

12. During my clerkship with Judge Robb, he consistently impressed me as an extremely intelligent and thoughtful individual. I am unaware of any significant lapses of memory on his part before November 1982, when Judge Robb suffered a stroke. I think it very unlikely that, had Judge Robb agreed in or after March 1982 to change the rationale of the Vander Jagt opinion to one of standing, he would have completely forgotten having done so by October 1982.

This affidavit is made this 21 day of October, 1987 at Los Angeles, California.

Joseph D. Lee

Subscribed and sworn to before me this 21st day of October, 1987

Notary Public In And For The State Of California

OFFICIAL SEAL
PAX SCHENKHUIZEN
Notary Public-California
Principal Office in
Los Angeles County
My Comm. Exp. Sept. 26, 1989

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

EXHIBIT A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

M E M O R A N D U M

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

EXHIBIT B

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork RHB

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in Riegle. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

EXHIBIT C

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

FOLLOWING IS THE STATEMENT OF
LIEUTENANT GOVERNOR RICHARD A. LICHT
CONCERNING THE NOMINATION JUDGE BORK TO THE SUPREME COURT

Our State has a long and proud history of concern for individual freedom. Founded by men and women seeking religious liberty, we were the first colony to declare our independence from Great Britain. Alone amongst the original 13 states, Rhode Island refused to join the Union until the Bill of Rights was adopted as part of the Constitution. That spirit of individual liberty, part of Rhode Island from its birth, remains equally strong today.

I am speaking out against the confirmation of Judge Bork because I have become convinced that placing Judge Robert Bork on the United States Supreme Court will impact those individual freedoms which we hold most dear. That impact will carry into the 21st century. I believe this nomination is an issue about which all citizens should be concerned.

In determining Judge Bork's fitness to serve on the Supreme Court, the U.S. Senate has a historic duty to consider his legal philosophy. The Constitution authorizes the Senate to give its "advice and consent" on judicial nominees. Those who designed our governmental system intended the Senate to exercise its responsibility by examining the philosophy and views of a nominee. The historical record shows that it has exercised that responsibility. Approximately 20% of Presidential nominees to the Supreme Court have been rejected.

In the American political system, the Supreme Court is the ultimate guardian of our rights as citizens. That is why when I first learned that President Reagan had nominated Robert Bork to the Supreme Court, I was disturbed. I recalled the firing of Archibald Cox as Watergate Special Prosecutor (later found illegal), as well as his reputation as a legal theorist opposed to the traditional role of the Court as the defender of individual rights. I therefore set out to learn more about Judge Bork's philosophy. During the last 6 weeks, I have read numerous articles and statements written by him and reviewed extensive studies of his entire record. Because he has been an active

commentator on issues of Constitutional law for more than 25 years, both as a professor and as a Judge, there is a very detailed record of Judge Bork's views.

We can best learn what he believes by his own words: on vital issues such as civil rights, freedom of speech, privacy, equal rights and anti-trust law, Judge Bork has publicly expressed disagreement with principles that have been the law of the land for decades.

Because there is this vast scope of material that expresses the nominee's judicial philosophy available for public review prior to the formal hearings, the Bork nomination is unique. This nomination, unlike others, does not present a situation where contested facts regarding the nominee's past need to be resolved by Committee inquiry. Judge Bork's views on the Constitution expressed in his own words throughout his long career are a public record for all to see. It is inconceivable that he will repudiate a lifetime of his work when he testifies before the Committee. Such a denial of his past opinion would be suspect.

Judge Bork's view of the Bill of Rights, Rhode Island's requirement for joining the union, is disdainful. In an article he wrote for the Indiana Law Journal, he called it "a hastily drafted document on which little thought was expended." Such an attitude hardly reflects the fidelity to the Constitution which should be a prerequisite for all judges, particularly Supreme Court Justices.

He has espoused a radical narrowing of the First Amendment guarantee of free speech, limiting it to comments which are explicitly political. He would exclude from protection other areas of legitimate societal debate, such as artistic and literary writings. No member of the present Supreme Court has expressed such an extreme view. He also rejects the famous "clear and present danger" test first enunciated in the 1920's by Justice's Holmes and Brandeis. Judge Bork would give the government far broader authority to censure controversial speech.

In 1984, he expressed disagreement with the traditional judicial standard for separation of church and state (Engel v

Vitale, 1962). Speaking at the University of Chicago, Bork argued that, "Constitutional doctrine cannot separate either religion and law, or religion and politics."

Judge Bork also rejects the concept recognized by the Supreme Court for decades of a Constitutionally based right of privacy. He has vehemently criticized decisions going back as far as the 1920's (Pierce v Society of Sisters, 1925 and Meyer v Nebraska, 1922) which recognize a zone of privacy around intimate family decisions into which government regulation cannot intrude.

In the area of civil rights, Judge Bork's views, too, are at odds with the broad-based national consensus which has evolved over the last four decades. He has been consistently unwilling to apply the law to eliminate the vestiges of segregation. He opposed enactment of the Civil Rights Act of 1964 which guaranteed all Americans - black and white - equal access to all public accommodations, such as hotels and restaurants. In an article written by him for New Republic Magazine, Bork described the use of the law to break down racial barriers as "itself a principle of unsurpassed ugliness." He was far more concerned about the "freedom of the individual to decide with whom he will deal," in other words the freedom to discriminate, than he was with the freedom of men and women of all races to use public accommodations.

As a nominee for the Court of Appeals, Bork attempted to distance himself from this position. However, the article cannot be dismissed as an isolated incident. He has publicly criticized Supreme Court decisions declaring racially restricted land covenants to be invalid, (Shelley v Kramer, 1948) and holding the poll tax to be unconstitutional (Harper v Virginia State Board of Examiners, 1966). Both of these rulings by the Court were widely supported steps toward eliminating legal barriers to integration. He has also expressed strong disagreement with the Court's "one man-one vote" rulings (Baker v Carr, 1962) which guarantee fair representation for all citizens. His comments on these Supreme Court cases reflect an extraordinarily narrow view of the Equal Protection Clause. And he has opposed such civil rights advances

as elimination of literacy tests and poll taxes used to prevent minorities from voting.

Judge Bork's past actions reflect even less sympathy for those seeking judicial protection from sexual discrimination than from racial prejudice. Less than two years ago, he wrote a judicial opinion stating that sexual harassment should not be considered an illegal form of discrimination (Vinson v Taylor, 1985). This view was unanimously rejected by the Supreme Court a year later in an opinion written by Chief Justice Rehnquist (Meritor Savings Bank v Vinson, 1986).

Judge Bork is simply not the symbol of judicial restraint which the White House has attempted to portray. An analysis of his record conducted for members of the Senate Judiciary Committee concluded:

> "The record of Judge Bork's public pronouncements and actions over the past quarter century paint a picture of Judge Bork as an extremely conservative activist, rather than a genuine apostle of judicial moderation and restraint."

An example of the Administration's distortion of his record is the often repeated claim that none of the 400 majority decisions in which Judge Bork joined since his appointment to the DC Court of Appeals has ever been overturned. This is highly misleading. The truth is that none of those cases have ever been reviewed by the Supreme Court. As noted earlier, his dissenting opinion in one major sex discrimination case was unanimously rejected by the High Court.

The ultimate question which each of us must answer is: Do we trust Judge Bork's judgment to interpret the Constitution as we begin our third century under its principles? Does his record demonstrate an understanding of the delicate balance between individual rights and governmental power which is at the heart of the American system? Does his record show an appreciation for the need to transform equal justice under law from a promise to a reality for all our citizens? Does it reflect a willingness to use judicial authority to curb the excesses of executive power? From his denigration of the First Amendment to his opposition to the Civil Rights Act, to his discharge of Archibald Cox as the Watergate Special Prosecutor, Judge Bork's record

tells us that the answer is "no," -- emphatically "no"! Judge Bork, who has termed the most important and influential writings of Justices Holmes and Brandeis as "deficient in logic and analysis," is definitely not the man to protect America's fundamental values in its third century. I urge the Senate to reject his nomination.

RICHARD A. LICHT
LIEUTENANT GOVERNOR, RHODE ISLAND

BRIEF IN OPPOSITION TO THE NOMINATION OF JUDGE BORK TO THE SUPREME COURT

This Brief sets forth numerous reasons for opposing the elevation of Judge Bork to the Supreme Court. It first addresses the propriety of taking a position prior to the Senate Hearings, addresses the question of the proper role of the Senate in the consideration of Presidential nominees to the Supreme Court and then details the threat posed by Judge Bork and his ideology to critical constitutional doctrines such as civil rights and freedom of speech as well as consumer interests.

I. JUDGE BORK'S VIEWS ARE NOT IN DISPUTE

While the Senate Hearings on the nomination of Judge Bork are a necessary part of the confirmation process, a full picture of Judge Bork may be painted on his record alone. He has written over fifty articles on legal and political issues, delivered some fourteen speeches, papers and debates, given some ten interviews, and authored some one hundred forty-four (144) judicial opinions (majority and dissent) in his years on the D.C. Circuit. These writings reflect the opinions and philosophy of this nominee to the Supreme Court.* Moreover, Judge Bork has testified twice before the Senate Judiciary Committee concerning these views, once in 1973 when he was nominated by President Nixon to the post of Solicitor General, Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Committee on the Judiciary, 93rd

* In fact, certain of his articles, speeches, and other writings foreshadow his decisions on the D.C. Circuit. See infra.

Cong., 1st Sess. (1973) (hereinafter 1973 Hearings), and again in 1982 when he was nominated by President Reagan to the D.C. Circuit. The Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982) (hereinafter 1982 Hearings).* This nomination, unlike other nominations to the Supreme Court, does not present a situation where contested facts need to be resolved before the nomination is put to a vote. Thus, it is appropriate to express a view on the nomination of Judge Bork based on this extensive written record.**

II. THE SENATE SHOULD CONSIDER JUDGE BORK'S IDEOLOGY AND CONSTITUTIONAL VIEWS

Any full consideration of Judge Bork's qualifications to serve as a Supreme Court Justice requires consideration of Judge Bork's ideology and constitutional views. Throughout American history, the Senate has engaged in a "practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." Rehnquist, The Making of a Supreme Court Justice, 29 Harv. L. Rev. 7 (October 8, 1959).

* Judge Bork has also testified before the Congress on several occasions regarding proposed legislation. See, e.g., Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm. on S. 158: A Bill to Provide that Human Life Shall be Deemed to Exist From Conception, 97th Cong., 1st Sess. (1981); Equal Educational Opportunities Act of 1972: Hearings on S. 3395. Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 1343 (1972).

** Some 3,000 pages of materials on Judge Bork have been assembled for members of the Judiciary Committee. Legal Times, Aug. 10, 1987.

Historically, one out of five nominees to the Supreme Court has been rejected by the Senate. Schwartz, "The Senate's Right to Reject Nominees," The New York Times, July 3, 1987. In recent history, the Senate rejected Nixon nominees, Haynsworth and Carswell and, the Senate in 1968, the last year of President Johnson's term, rejected liberal nominee Abe Fortas. Senator Strom Thurmond, a strong Bork supporter, stated at the time:

> It is my opinion, further, that if the Senate will turn down this nomination, we will thus indicate to the President and future Presidents that we recognize our responsibility as Senators. After all, this is a dual responsibility. The President merely picks or selects or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into his character and integrity, and into his philosophy, and determining whether or not he is a properly qualified person to fill the particular position under consideration at the time. Cong. Rec. S28774, Sept. 30, 1968.

In 1795, the Senate by a vote of 14-10 rejected President Washington's nominee John Rutledge, a distinguished lawyer, because of his opposition to the Jay Treaty. The Senate's "advice and consent" power was adopted during the Constitutional Convention instead of provisions allowing appointment by the Senate alone or by the President alone. This "advice and consent" power was intended to check the President and to preserve the independence of the judiciary by providing a substantive role for the Senate in the selection of judges. The same language of "advice and consent" is used similarly in the Constitution to describe the substantive role of the Senate in the acceptance or rejection of the treaties. U.S. CONST. Art. II, Section 2.

Thus, the Constitution, its history, and the nature of the work of the Supreme Court requires that the Senate consider ideology. The Supreme Court decides whether to uphold laws seeking to protect, guarantee or withhold equal rights for minorities and whether to protect speech critical of government officials. A Senator would be remiss in failing to consider the ideology of a Supreme Court nominee, as even Bork supporters, such as Senator Thurmond and Senator Dole, have acknowledged. "Bork Would Assist Prosecutions, Dole says: High Court Nominee Touted as Foe of Exclusionary Rule." Washington Post, Aug. 14, 1987. Further, the Senate must consider all factors which the President has considered in determining whether to "consent" to the President's selection and in determining its "advice" to the President. In the case of Judge Bork, the President himself has made ideology the issue. The President declared Judge Bork the champion of "judicial restraint," but the Bork record, to the contrary, reflects a judicial activist whose decisions reflect personal ideology, an ideology critical of existing Supreme Court law.

III. JUDGE BORK IS A JUDICIAL ACTIVIST WHOSE KNOWN VIEWS CHALLENGE ESTABLISHED CONSTITUTIONAL DOCTRINE

Judge Bork has made it plain that he favors overturning numerous existing Supreme Court doctrines and that it is proper for the Supreme Court to do so. He has stated that the President's appointment power is the way to change the Supreme Court's ideology: "The only cure for a Court which oversteps its bounds that I know of is the appointment power." 1982 Hearings, at p.7. He has stated that overruling "wrong and perhaps pernicious"

decisions is proper. Id. at p. 14. And, as to the doctrine of stare decisis,

> If a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the Court." Id. at p. 13.

As Judge Bork restated in 1985 in an interview: "The court ought to be always open to rethink constitutional problems....a judge's basic obligation or basic duty is to the Constitution, not simply to precedent." "A Talk with Robert Bork," 9 District Lawyer (No. 5, May/June 1985). In a 1987 speech Judge Bork reiterated his philosophy that if a constitutional judge concludes that "the courts have misunderstood the intent of the founders, he is freer...to overturn a precedent." Speech, Federalist Society Lawyers Convention, Washington, D.C. (Jan. 31, 1987). Judge Bork's view of the Constitution and the intent of the founders will clearly influence his understanding of his duty.

1. The Equal Protection Clause and Discrimination

A. Women

Judge Bork believes the equal protection clause is limited in application to procedural equality and its original intent of prohibiting the government from discriminating "along racial lines....The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1,11 (1971) (hereinafter IND. L.J.). Thus, Judge Bork would not

prohibit sexual discrimination under the 14th Amendment, contrary to established law. See Reed v. Reed, 404 U.S. 71 (1971). See also, Speech, "Federalism and Gentrification," The Federalist Society, Yale Univ., April 24, 1982 ("extensions of the Equal Protection clause to groups that were never previously protected....not justified by anything in the Constitution.")*

This narrow interpretation of the Constitution has infected Judge Bork's reading of Congress' statute prohibiting sex discrimination, Title VII. In a recent dissent, Judge Bork argued that Title VII should not apply to sexual harassment because of the "awkwardness of classifying sexual advances as 'discrimination,'" Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 f.2d 1330, 1333 n.7 (1985), and that in any event the defendant should be allowed to prove the voluntariness of the conduct. 460 F.2d at 1330. The Supreme Court in a unanimous decision on these issues authored by Chief Justice Rehnquist rejected Judge Bork's views and held unequivocally that Title VII does prohibit sexual harassment and that proof of voluntariness is not permitted. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

B. Race

In 1963 during the debate on the "proposed Interstate Public Accommodations Act outlawing discrimination in business facilities serving the public," Judge Bork expressed his view

* Judge Bork has also expressed his opposition to the passage of the Equal Rights Amendment (ERA), although stating recently that as a judge he does not feel free to comment on the ERA. McGuigan, Judge Bork is a Friend of the Constitution, 11 Conservative Digest 91, 95 (Oct. 1985).

that "the morality of enforcing morals through law" was a "principle of unsurpassed ugliness." New Republic, Aug. 31, 1963. This opposition was based on both "a loss in a vital area of personal liberty" and the "practicality" of enforcing a law "which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country." Id. In the 1973 Hearings Judge Bork claimed to have changed his mind because the "statute has worked very well...." 1973 Hearings, p. 14. Nonetheless, in these same Hearings Judge Bork expressed his disagreement with the decision in Harper v. Virginia State Board of Examiners, 383 U.S. 663 (1966), a decision which struck down a state poll tax. Id. at p. 17.

In his far ranging Indiana Law Review article, Judge Bork harshly criticized numerous other Supreme Court decisions invalidating racially discriminatory policies. Bork argued that Shelley v. Kraemer, 344 U.S. 1 (1948) which held racially restrictive covenants unconstitutional was not a correct decision, or justifiable. 47 IND. L.J. at p. 15. Judge Bork attacked cases decided under the Equal Protection clause as "running counter to the text of the fourteenth amendment," arguing that the "state legislative reapportionment cases establishing the principle of one person, one vote were wrongly decided, and the opinions of Chief Justice Warren lacked "a single respectable supporting argument." IND. L.J. at p. 18, citing Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964) and Lucas v. Forty-Fourth Gen. Assy, 377 U.S. 713 (1964). Judge Bork has also criticized the Katzenbach v. Morgan, 384 U.S. 1(1966)

decision, which upheld the constitutionality of the Voting Rights Act provision which guaranteed voting rights for persons educated in Puerto Rico, 1973 Hearings at p. 16, on the grounds that the Supreme Court not Congress should decide whether such literacy tests are constitutional.

And, ironically, Judge Bork, whom the Reagan administration has been trying to package as a moderate in the tradition of Justice Powell, has harshly criticized the decision of Justice Powell in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), which upheld affirmative action as "not ultimately persuasive" and "resting upon no constitutional footing of its own." Wall Street Journal, July 21, 1978.

2. The First Amendment

Similarly, in the area of the First Amendment, Judge Bork is critical of existing Supreme Court doctrine. Judge Bork would only protect a narrow class of speech which he calls "speech that is explicitly political." IND. L.J. at p. 20. Judge Bork criticized the case Roth v. United States, 354 U.S. 298 (1957), which held that the First Amendment protects artistic, literary and scientific works, Id. at p. 23, based on "our own theory of the constitutional protection of speech." Id. at p. 23. Judge Bork who in the area of the Fourteenth Amendment expressed his loyalty to original intent, concluded that creating his own theory about the first amendment was proper since:

> The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject....The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended." Id.

This conclusion at a minimum is contrary to existing Supreme Court law and as a theoretical matter as well is incorrect, see Dworkin, The Bork Nomination, 34 The New York Review, No. 13 at 8 n.7 (Aug. 13, 1987). Nonetheless, Judge Bork does not hesitate to adopt his own philosophy as a mode of judicial analysis. Asked about these views at the 1982 Hearings, Judge Bork cryptically replied:

> It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested. On the other hand, while political speech is the core of the amendment,.. the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971. Hearings at pp. 4-5.

This statement is far from a complete abandonment of the theory and there is evidence that his view of speech is somewhat limited. See, e.g., Finzer v. Barry, 798 F.2d 1450 (1986), cert. granted, sub nom. Boos v. Barry, 107 S.Ct. 1282 (1987) (upholds D.C. rule excluding placards opposing policy of foreign government within 500 feet of foreign embassy in deference to asserted governmental interest of not offending foreign governments).

Moreover, Judge Bork has criticized other central doctrines under the First Amendment. He would seek to overturn the principles of Brandenburg v. Ohio, 395 U.S. 444 (1969), derived from the famous Brandeis concurrence Whitney v. California, 274 U.S. 357 (1927), that speech which advocates the overthrow of government or any violation of law may only be prohibited upon a showing of a "clear and present danger" or "imminent lawless action." IND. L.J. at pp. 23, 31. See also Speech, "The

Individual, the State and the First Amendment," U. of Mich. 1978 (criticizes these cases for their "Unjustified tenderness, indeed solicitude, for the well-being and vigor of subversive advocacy"). In this article, Judge Bork also criticized the case of Cohen v. California, 403 U.S. 15 (1971), which had upheld the right of a protester to express some disagreement with the draft on his T-shirt in the courthouse.

Judge Bork has also expressed his disagreement with Supreme Court decisions which protect the separation of church and state, such as Aguilar v. Felton, 473, U.S. 402 (1985) as well as the three-part test applied by the Supreme Court in cases such as Engel v. Vitale, 370 U.S. 421 (1962). See Brookings Speech, Sept. 12, 1985 ("Constitutional doctrine cannot separate either religion and law or religion and politics."); Religion and the Law, U. of Chic. Nov. 13, 1984.

3. Privacy

Judge Bork's abhorrence of the constitutional right to privacy is no secret. He has expressed this view repeatedly, starting with his early disparaging discussion of Griswold v. Connecticut, 381 U.S. 479 (1965), the case which protected the individuals' choice to use contraceptives, as an "intellectually empty," "unprincipled decision." IND. L.J. at pp. 9-11.* Most recently, in the decision, Dronenburg v. Zech, 741 F2d. 1388 (1984) where the court upheld a military discharge based on

* In this same discussion he concluded that its antecedents were also "wrongly decided": e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (struck down law requiring children to attend public rather than private schools); Meyer v. Nebraska, 262 U.S. 390 (1922) (struck down statute forbidding teaching in language other than English).

homosexuality, Judge Bork took the liberty of expounding on the difficulties inherent in the right to privacy. 741 F.2d at 1388. Judge Bork's colleagues in dissent criticized his use of this decision to generally inveigh against existing Supreme Court precedent. See also Speech, "Federalism and Gentrification, the Federalist Society" Yale Univ., April 24, 1982 (criticism of Roe v. Wade). The area of privacy is likely one where Judge Bork would overturn existing Supreme Court precedent. See "No Grass is Growing under Judge Bork's Feet," New York Times, Aug. 4, 1987 (Bork reported to have told Senator Packwood that he would have dissented from Roe and that Roe is not so settled that it cannot be overruled. However, the impact of Judge Bork's denial of a constitutionally based right of privacy would go far beyond this issue. His view would allow governmental intrusion into the most intimate family issues.

IV. JUDGE BORK WILL PROTECT BUSINESS AND WORK AGAINST THE INTERESTS OF THE INDIVIDUAL AND THE CONSUMER

Studies of Judge Bork's judicial record demonstrate that the result of his decisions may be accurately predicted upon knowledge of the identity of the parties. See The Judicial Record of Judge Robert Bork by Public Citizen Litigation Group (in split decisions brought against the executive by non-business groups, Judge Bork rules 26-2 in favor of the executive; in split decisions in cases brought by business interests against the executive Judge Bork ruled 8-0 in favor of business; and in split decisions involving access to the courts rules 14-0 against access); Statement and Memorandum by the AFL-CIO in Opposition to

the Nomination of Judge Robert H. Bork (similar conclusions); Setting the Record Straight: Judge Bork and the Future of Women's Rights by the National Women's Law Center; Colum. L. Rev. (forthcoming).

Judge Bork has consistently voted against the interests of consumers and other non-business plaintiffs and deferred to administrative agencies. See, e.g., Bellotti v. Nuclear Regulatory Commission, 725 F.2d 1380 (1983) (Bork upheld NRC order denying petition of Attorney General of Massachusetts to intervene in proceeding on nuclear plant); Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984) (Bork held that OSHA regulation requiring the work place to be "free from recognized hazards...causing death or serious physical harm" did not prevent company policy of not allowing women of child bearing age to hold certain jobs unless surgically sterilized); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 789 F.2d 26 (en banc) (1986), cert. denied, 107 S.Ct. 330 (1987) (Bork upheld NRC decision not to hold hearings before issuing a license concerning the potential effects of an earthquake and nuclear plant located three miles from active fault (Wald, J., joined by four judges in dissent, argues that Bork ignored purpose of NRC regulation requiring "emergency planning"); McIlwain v. Hayes, 690 F.2d 1041 (1984) (Bork upheld FDA determination that sale of color additives 22 after passage of 1960 Color Additive Amendments to the Food, Drug and Cosmetics Act without showing that they are safe is proper).

At the same time, he has upheld business challenges to administrative decisions and upheld the interests of business in a wide variety of situations.* See, e.g., Restaurant Corporation of America v. NLRB, 801 F.2d 1390 (1986) (Bork overturned NLRB decision reinstating two employees fired for union solicitation when other solicitation allowed by employer; accused by dissent of "trenching on important policymaking prerogatives of the NLRB." (801 F.2d at 1403); Jersey Central Power and Light Co. v. FERC, 810 F.2d 1168 (en banc) (1987) (Bork reversed decision of FERC and held that FERC should hold hearing to determine whether disallowance to utility of return on investment in connection with expenses of suspended nuclear plant was proper) (Mikva, dissenting, criticized lack of deference to administrative agency and solicitude for utility corporations); Middle South Energy v. FERC, 747 F.2d 763 (1984) (Bork held FERC lacked authority to suspend initial rate filing of utility.

Judge Bork has also established a pattern of denying access to individuals seeking redress in the courts. See, e.g., Bartlett v. Brown, 816 F.2d 697 (1987), order granting en banc review and vacating opinion withdrawn (July 31, 1987) (Bork, dissenting, would deny Social Security claimants right to challenge constitutionality of Medicare Act based on sovereign immunity); Barnes v. Kline, 759 F.2d 21 (1985) (Bork, dissenting), vacated sub nom. Burke v. Barnes, 107 S.Ct. 734 (1987) (Bork argues that

* These pro-business decision are also consistent with Judge Bork's limited view of the proper application of the antitrust laws. See, e.g., 1973 Hearings at p. 11 ("the conglomerate merger campaign was an antitrust mistake").

Congress did not have standing to challenge presidential use of pocket veto).

V. JUDGE BORK'S VIEW OF THE ROLE OF AND DEFERENCE TO BE ACCORDED TO THE EXECUTIVE IS EXTREME AND DANGEROUS

The events of 1973 when Judge Bork fired Special Prosecutor Archibald Cox, rescinded the government regulation which created the Office of the Special Prosecutor and subsequently reinstated, three weeks later, the same regulation, tells its own story about Judge Bork. In Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), the court held that Judge Bork illegally fired Archibald Cox since the regulation which created the Special Prosecutor provided that the Special Prosecutor "will not be removed....except for extraordinary improprieties on his part." Bork conceded that the case did not involve "extraordinary improprieties." Moreover, the court held the abolition of the Office of Special Prosecutor "arbitrary and unreasonable" since the regulation also forbad total abolition of the Office without the consent of the Special Prosecutor. 366 F. Supp. at 108. Judge Bork has testified that he always intended the Office's functions to go forward, that "there was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's Office." 1982 Hearings, at p. 9. The record is to the contrary. On October 20, Bork discharged Cox and on October 23 he rescinded the regulation creating the Office. 366 F. Supp. at 107. Such

conduct threatened to totally undermine the investigation. Only some three weeks later did he reinstate the regulation.

Consistently throughout his career Judge Bork has been a forceful advocate of broad and unchallengable executive power. From his endorsement of the inherent power of President Nixon to launch the attack on Cambodia, Bork, "Comments on the Legality of the United States Action in Cambodia," 65 Am. J. Int'l Law 1, 79 (1971), referenced in 1973 Hearings at pp. 8-9, to his dissent in Abourezk v. Reagan, 785 F.2d 1043 (1986), cert. granted, 107 S.Ct. 666 (1986) where he argued that the court should have deferred to the Executive's denial of visas to foreigners invited to present political views to his testimony that Congress could not require executive intelligence agencies to obtain a warrant before wiretapping American citizens suspected of engaging in secret activities on behalf of a foreign country, Foreign Intelligence Surveillance Act: Hearings on H.R. 7308 Before the Sub comm. on Courts and Civil Liberties of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 130 (1978), Judge Bork's view of the Executive has remained the same--powerful and protected from public scrutiny by other branches of the government.

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September 29, 1987

Senator Joseph Biden
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I am writing this letter to you and other members of the United States Senate relative to the impending vote for the confirmation or rejection of Supreme Court Nominee Robert Bork.

First, on behalf of former President Jimmy Carter I wish to make it quite clear that the other former members of his Administration who have testified in favor of Judge Bork's confirmation did not and do not express his opinion regarding this matter.

To the contrary, within the past few days President Carter has stated publicly his deeply considered and strong opposition to the confirmation of Judge Bork. With his approval I quote:

"Robert Bork's views on key legal and social issues are diametrically contrary to the best interests of the American people and of our nation."

As White House Counsel for close to three years, and as a private practicing attorney in Atlanta, Georgia for nearly forty years, I have both observed and experienced an era of the greatest and most traumatic progress, in human terms, in our country's history. This is particularly true in my native South.

I join President Carter in expressing opposition to the confirmation of Robert Bork. After watching Judge Bork's testimony before your committee I have become convinced that — regardless of his intellectual background — he represents a genuine threat to the continuation of our country's progress in many vital areas of personal liberty and of human relationships including relations between the races.

As an American — and particularly as a Southerner — I do not wish to invite a re-run of the battles so recently fought, battles which resulted in victories that now are widely accepted and appreciated by the overwhelming majority of our people.

Sincerely yours,

Robert J. Lipshutz

Robert J. Lipshutz
(Counsel to the President)
January 20, 1977 to September 30, 1979

MARYLAND ASSOCIATION OF EQUAL OPPORTUNITY PERSONNEL
ON THE NOMINATION OF JUDGE ROBERT BORK

This written testimony is being submitted by the Maryland Association of Equal Opportunity Personnel (MAEOP) to oppose and urge the rejection of Judge Robert Bork's confirmation to the U.S. Supreme Court. MAEOP is a professional organization of State of Maryland employees having various equal opportunity, affirmative action and civil rights responsibilities. A goal of our organization is to monitor and, where possible, influence the development and implementation of State of Maryland employment policies and procedures to ensure equity, consistency and non-discrimination. Since in most areas, especially in the areas of equal opportunity and affirmative action, federal law, policy and philosophy directly influence the development and implementation of states' fair employment laws, and consequently our roles as State equal opportunity and affirmative personnel, we are naturally and necessarily concerned when a potential exist for great shifts in federal legislative and/or judicial philosophy. MAEOP views the Judge Bork nomination as such a potential.

Although we are as concerned as other Bork opponents with regard to his position on many issues affecting American life, this written testimony will address our specific concerns with regard to the Judge's views on equal protection, equal opportunity and affirmative action.

We don't feel that it would be an exaggeration to state that the future of equal opportunity and civil rights in general and of affirmative action in particular are now at stake and that their future status is contingent upon the outcome of the hearings considering Judge Robert Bork's nomination and confirmation to the Supreme Court.

Judge Bork had consistently shown that he has little or no

regard for equal employment opportunity, affirmative action, the right to privacy or equal protection. Reviews of his speeches, writings and decisions have shown him to be extremely and consistently conservative, and in particular with regard to the issues of civil rights and affirmative action, his conservatism could deal a deadly blow to the protections and basic liberties that women and minorities have come to expect and now take for granted as a result of the Supreme Court's interpretation of the Constitution.

In particular, recent Supreme Court decisions upholding voluntary affirmative action and upholding court imposed hiring quotas where past discrimination has been shown have been encouraging to women and minorities and to those of us who know that there is still a crucial need for affirmative action to remedy decades of closed doors and limited opportunities. However, our enthusiasm over these decisions notwithstanding, we are extremely cognizant of the fact that many of these recent opinions were not decided unanimously but were decided by a very narrow margin, and in many cases by only one vote - Justice Lewis Powell's so called "swing vote. As the Court seems to be currently pretty evenly, albeit fragilely, ideologically balanced - that one vote remains extremely significant and if given to the likes of a Judge Robert Bork, similar decisions would most likely be reduced if not totally eliminated.

Whereas, the Supreme Court recognized the importance of affirmative action and upheld some forms of race conscious decisions through opinions such as Regents of the University of California v. Bakke - which Justice Powell wrote - Judge Bork, in a 1978 Wall Street Journal article spoke out against the Bakke decision. Whereas, in the recent Johnson v. Transportation Agency of Santa Clara County decision, the Supreme Court and Justice Powell upheld voluntary affirmative action plans and the taking of sex into account as a factor in making an employment decision, and in the

Wygant v. Jackson Board of Education decision - which Justice Powell wrote - the Supreme Court provided for the taking of race into account to remedy past discrimination, Judge Bork has stated that the Equal Protection Clause does not provide for such remedies of past discrimination. Whereas in Meritor Savings Bank v. Vinson, Justice Powell and the Supreme Court upheld a claim of sexual harassment even though there was apparent consent, Judge Bork questions whether sexual harassment should even be prohibited discrimination under Title VII of the Civil Rights Act of 1964, as amended.

Not only has Judge Bork, through his writings and speeches made it abundantly clear that he would not have supported such decisions, his statements regarding a justice's right to correct prior Supreme Court decisions, lead us to believe that he might go so far as to try to overturn some of these and similar decisions favoring equal opportunity and affirmative action.

MAEOP feels compelled to speak out against and fight the confirmation of Judge Bork; of this man who has consistently demonstrated a negative attitude toward civil rights, civil liberties and equal protection; who has made it abundantly clear that he is against Supreme Court and federal legislative remedies for segregation and discrimination; a man who feels that discrimination in employment is difficult if not impossible to prove; who rejects the principle of a Constitutional right to privacy; who opposes the ERA; who feels that except for the right to vote, the Constitution extends no particular rights to women; who calls unconstitutional the Court decision which made poll taxes illegal; this man who has an apparent disrespect for the Bill of Rights; who in 1963 spoke out against provisions of the Civil Rights Act of 1964 (criticisms he later recanted); and a man who according to extensive and objective studies

by the Columbia Law Review votes consistently conservative in civil rights cases and who votes overall consistently more conservative than any other Reagan judicial appointee.

Despite what Judge Bork now professes, his views are well documented and substantiated by years of his own writings, speeches and written judicial opinions. MAEOP doubts that he would now suddenly abandon and reject these longstanding views.

For the reasons enumerated above and for others shared by other concerned citizens, the members of the Maryland Association of Equal Opportunity Personnel urge the Senate Judiciary Committee to reject Judge Bork's confirmation for we feel that opened doors will once again be shut, and removed barriers will reappear should this man become the 104th justice to the U.S. Supreme Court.

Respectfully Submitted,

Yvonne A. Edwards
Chairperson

Professor William Shepard McAninch
School of Law
University of South Carolina
Columbia, South Carolina 29208

September 21, 1987

The Honorable Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator Biden:

Judge Robert H. Bork was a Distinguished Visitor at the University of South Carolina School of Law during the spring semester 1983, shortly after he was appointed to the United States Court of Appeals for the District of Columbia. It was his practice to commute from Washington to Columbia for his once a week class on constitutional decision-making.

During this time he participated in a faculty colloquium in the course of which he stated that in his view the fourteenth amendment was not intended to incorporate the guarantees of the various provisions of the bill of rights against the states. He explicitly stated that the first amendment's protection for freedom of speech and press should not have been held applicable to the states. He did add that he was not certain, though, whether those decisions should now be reversed and that it was in all events unlikely that they would be.

I recall these remarks because they were in response to questions which I had asked. My constitutional law class was then covering the doctrine of selective incorporation, and both my students and I were interested in Judge Bork's views on this issue. Professor Randall Chastain shares my recollection.

Sincerely,

William S. McAninch
Professor of Law

WSM/ds

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STATEMENT IN OPPOSITION TO CONFIRMATION
OF JUDGE BORK

Mister Chairman and members of the Committee, my name is Francis X. McLaughlin and I have been admitted to the practice of law in several states. I have been a member of the District of Columbia bar since 1956.

I note, for further identification purposes, that I first came to the nation's capital in 1950 as the youngest special agent to have been appointed to the United States Secret Service. After an assignment with the then Protective Research Section at The White House, I resigned to attend Georgetown Law School from where I graduated in 1956. I subsequently served with several investigating committees of the House and in 1957-58 I supervised the investigation which led to the forced resignation of Governor Sherman Adams, President Eisenhower's White House chief of staff.

In the private practice of law I have represented clients before Senate and House committees, before various courts, and, in various parts of the United States, Latin America, Europe and the Middle East.

I respectfully urge you to not vote to confirm Judge Robert H. Bork's nomination for appointment to the United States Supreme Court, for, among other reasons, those set forth in the five page memorandum which I am submitting with this statement.

The attached memorandum was also submitted in August to the ABA's Standing Committee on the Federal Judiciary and I have reason to believe that it was a persuasive factor in the considerations of at least those members who decided that, in their opinions, Judge Bork is not qualified to be a justice of the Supreme Court.

Unlike those witnesses who oppose Judge Bork because of their perception that he differs from their ideological beliefs, I am opposed to him because, in my opinion, he is lacking in judicial integrity and competence as he demonstrated in a recent case. As is stated in the attached memorandum, Judge Bork made fourteen factual errors and falsely implied that the Speaker of the U.S. House of Representatives had perjured himself in truthful, unrefuted and uncontested testimony the Speaker gave in a civil suit. In this same opinion Judge Bork fabricated two judicial proceedings which had not occurred but which he cited in support of his judicial "reasoning". After making 14 factual errors and creating non-existent events, Judge Bork compounded his incompetence by making unsupported assumptions so he might justify his misapplication of the law which he contended governed the case.

An objective study of Judge Bork's writings and judicial conduct reveals a glib, opportunist whose oftentimes "strange" views are occasionally published in periodicals aimed at limited reading audiences.

Judge Bork can be particularly arrogant in his demeanor towards ordinary litigants who are trying to obtain justice against powerful organizational interests. This "cutting" aspect of Judge Bork's character is consistent with reports of his disdain for those laws which may impact on him. I refer specifically to earlier news accounts that, until nominated to the Supreme Court, he had, for years, simply ignored bills for personal property taxes which other citizens are obliged to pay (and which Judge Bork purportedly paid only after he was nominated and his tax avoidance became public).

Having practiced law for some 31 years I have been involved in litigation in which certain federal judges have abused their office. I would consider Judge Bork's performance in the case described in the attached memorandum as comparable, judicially speaking, with that of the compliant judges who allowed well-connected lawyers to arrange, at the expense of thousands of disadvanteged children, for the control of a $100 million NFL franchise to pass to a multi-millionaire for a ridiculous investment of some $250,000. This type of judicial abuse, like another case in which federal judges refused to allow a hearing to receive "smoking gun" proofs that the head of one of the nation's wealthiest families had, along with several of his "prestigious" attorneys, engaged in multi-million fiduciary fraud (in an attempt to deceive the courts and hundreds of creditors), is clearly not in the best interests of the American people.

I respectfully suggest that the public is entitled to a Supreme Court whose members, unlike Judge Bork, do not fabricate events in an attempt to support their pre-conceived judicial "reasoning".

Sincerely yours,

Francis X. McLaughlin

enclosure: Memorandum, including
excerpts from the transcript
of the deposition of the
Hon. Thomas P. O'Neill, Jr.

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Memorandum As To The Unsuitablity of Judge ROBERT A. BORK To Serve On The United States Supreme Court

The following information and the attached documents which reflect an abuse of judicial power constitute some of the reasons Judge Robert H. Bork is unsuited for an appointment to the U.S. Supreme Court.

In a recent opinion Judge Bork, without any basis in fact and in an apparent attempt to ingratiate himself with influential media interests, falsely implied that former House Speaker Thomas P. O'Neill, Jr. had committed perjury in sworn testimony he gave in 1983 in a civil suit. Not only was Speaker O'Neill's said testimony absolutely true, it was unrefuted and uncontested in the litigation and fully supported in a 1978 report issued by a House committee after an extensive investigation concerning the relationships, if any, of the Speaker and myself in a particular business venture (see, infra for details).

Not satisfied with falsely implying that the Speaker had committed perjury, Judge Bork proceeded to fabricate several non-existent events, and, committed 14 errors of fact in the same opinion (see, infra, and McLaughlin v. Bradlee, Et Al., 803 F.2d 1197, decided October 21, 1986).

A careful analysis of the record and matters referred to by Judge Bork in this opinion reveals that either through judicial incompetence or intellectual ineptness he, Bork, misapplied principles of law to rationalize his preconceived intent to affirm the dismissal of this particular civil action. Judge Bork's misapplication of the law is proven in his erroneous assumption that certain issues had been judicially determined earlier, when, in fact, as the record shows, they had not been actually litigated (see, infra).

The civil suit which was the subject matter in the appeal heard by Judge Bork and two other members of the U.S. Court of Appeals for the District of Columbia Circuit alleged a conspiracy by the defendants (The Washington Post Co., its executive editor Ben Bradlee, former columnist-reporter Maxine Cheshire and several police detectives whose assistance had been enlisted by the Post in its widespread, but unproductive, investigation of Speaker O'Neill and myself). This suit, which alleged, among other wrongs, an obstruction of justice in an earlier action, was dismissed without a hearing or trial by U.S. District Court Judge Charles R. Richey who also imposed some $13,000 in sanctions in favor of Mr. Bradlee, et al. (I later learned that Judge Richey was personally indebted to Mr. Bradlee and the Post for

not pursuing a story carried in a nationally syndicated column which reported that Judge Richey, while on official court business in Los Angeles, Calif., had entertained prostitutes in his hotel room.)

Judge Bork's False Implication That Speaker O'Neill Perjured Himself

In Bradlee (803 F.2d 1197) Judge Bork gratuitously, and erroneously, proclaimed that Speaker O'Neill and I were involved together in an Irish company. In his October 21, 1986 opinion Judge Bork wrote:

> Around late 1977, Cheshire shifted the focus of her investigation to links between McLaughlin and O'Neill through their participation in an Irish fishing company. (Id. 1199, emphasis supplied)

He then repeated his imagined version of this non-existent relationship by noting with reference to the same Irish company:

> Directing her investigation to Montgomery County, Maryland, the county of residence for McLaughlin, O'Neill and several others involved in the company... (Id. 1199, emphasis supplied)

By so finding, Judge Bork, without any basis in fact, clearly implied that Speaker O'Neill perjured himself when he truthfully testified at a deposition taken at the Capitol on September 29, 1983 by unequivocably denying, under oath, that he had ever been "involved financially or personally" with my Irish fishing company.

> "Not directly or indirectly in any manner, shape or form". (see lines 12 thru 18 of attached page 7 from the transcript of Speaker O'Neill's deposition of September 29, 1983, emphasis supplied).

The Speaker's sworn denial of any such involvement was fully substantiated in the extensive investigation, both here and in Ireland, by the House Committee on Standards of Official Conduct in 1977-78 (see House Report No. 95-1817).

And, as mentioned above, the Speaker's sworn denials of any involvement were neither refuted nor contested by any of the parties.

Judge Bork's Fabrications And 14 Errors of Fact

In addition to ignoring the record before him (which record is void of any basis for Judge Bork to conclude, as he did, that the Speaker and I were involved together in an Irish fishing company) he, Bork, further misused his judicial powers by twice fabricating a non-existent "extradition" (see, Id, 1199 and 1200). Had he bothered to familiarize himself with the record he would, or should, have been aware there had been no extradition in this matter. (After two governors of Maryland refused to sign a Florida extradition warrant because of their concern over the conduct of certain law enforcement officials in this case, I voluntarily flew to Fort Lauderdale to contest the false charge that had been concocted by the Post columnist and the police detective who had been assigned to help her in the investigation of the Speaker and myself. At a pretrial hearing on my motion to dismiss the charge, which motion was supported by irrefutable evidence of the truth of the statement which had been used to have me charged with perjury (to discredit me), the trial judge ordered the prosecutor to describe the proofs which the state proposed to offer at the trial. When the prosecutor was forced to admit in the courtroom that there never had been any evidence to support the charge, the Florida judge immediately dismissed the case.)

Judge Bork not only fabricated an extradition, he also created a non-existent "trial" (see, Id, 1206). If Judge Bork should attempt to persevere in contending that the district court judge (Richey) was able to observe my "conduct during the trial" (Id, 1206) which never occurred (the record shows there wasn't even a hearing much less a trial) he shouldseriously consider taking early retirement rather than seeking appointment to the Supreme Court.

Rather than describe each of the 14 errors of fact committed by Judge Bork in Bradlee I will, for the time being, list the pages at which these errors appear in 803 F.2d, namely, at page 1199 (four errors), 1200 (three errors), 1202, 1203, 1204 (four errors) and 1206.

Judge Bork's Unsupportable Assumptions And Resulting Misapplication Of Law

Judge Bork's propensity to fabricate and fictionalize in this case was compounded by his improper use of unsupportable assumptions which were followed by his misapplication of the law.

The fluctuating judge-made law used to "justify" the dismissal of this lawsuit at the district court level was res judicata (which is now more popularly known as "claim preclusion").

Judge Bork affirmed the dismissal but on the entirely separate and distinct ground of "issue preclusion" (previously generally known as "collateral estoppel"). In affirming the dismissal Judge Bork cleverly avoided saying Judge Richey was incorrect in his reasoning that claim preclusion applied (even though, as the record shows, the "claims" which Judge Richey ruled were barred had not come into existence until after the disposition of an earlier case which was the basis for the later claims of obstruction of justice, etc.).

Although Judge Bork acknowledged in Bradlee that the law of "issue preclusion" may be invoked in the Circuit in which he serves only if the "same issue" had been earlier (1) actually litigated, and (2) actually and necessarily determined by a court, Id at 1201, he made, as shown below, completely unsupported assumptions the "same issues" had been earlier "actually litigated" etc., and dismissed the multi-million dollar suit against Mr. Bradlee, the Post, et al.

At footnote 3, Id, 1202, Judge Bork referred to the two counts which were before the appellate court in Bradlee, and, for the purpose of this memorandum I will refer to them as the "privacy count" and the "abuse (of process) count". He, Bork, also stated that "our finding of issue preclusion" (which he used to dismiss the suit) rests "solely on the decisions reached by..." the Maryland state court and the D.C. federal court (in an earlier case against a detective which was assigned to Judge Gesell), see, footnote 3, Id, 1202 However, as to the,

"Privacy Count"

Maryland State Court: The tort count was dismissed before trial because of a demurrer which was sustained without leave to amend. The separate constitutional aspect was never reached because the trial judge equated the constitutional count with a business tort count involving entirely different issues. Neither aspect of the "privacy count", which involved entirely different issues from those presented in the constitutional right to privacy count in the case before Judge Bork, were ever "actually litigated" or "actually and necessarily determined" in the Maryland court.

D.C. Federal Court: The record clearly shows that Judge Gesell declined to exercise pendent jurisdiction as to the invasion of "privacy" count and, after denying a written request to include the constitutional right to "privacy" claim in the trial he also denied an oral request that it be so included. As in the Maryland state court case, Judge Gesell did not "actually litigate" etc., the "same issues" presented in the case before Judge Bork.

"Abuse Count"

Maryland State Court: The claim in the state court involved the use of a Maryland state court process in a 1978 criminal proceeding which did not pertain to the "same issues" in the count before Judge Bork that was based on discovery fraud in 1983 in a civil suit.

D.C. Federal Court: Again, the record is clear that Judge Gesell declined to exercise pendent jurisdiction as to the state abuse of process tort (again related to the 1978 state court process in a criminal case) so that there were no, much less the "same", issues actually

litigated or actually and necessarily determined by Judge Gesell in the case before him.

Therefore, had Judge Bork conscientiously performed his sworn duty to fairly render justice instead of engaging in contrived intellectual posturing he could have ascertained that the very "issues" he cited as the basis for his ruling had, in fact, never been "actually litigated".

Judge Bork is remembered by some as the opportunist who, at the time of the so-called "Saturday-night Massacre", agreed to be attorney-general of the United States after two honorable men refused to be bound by then President Nixon's "Watergate" agenda which was designed to try and keep the latter in office.

If Judge Bork is nominated for appointment to the U.S. Supreme Court I request the opportunity to present additional information concerning his and Judge Richey's adversarial roles to former Speaker O'Neill who, as the House Majority Leader, was generally credited, at the time, with having played significant roles in bringing about the resignations of Vice President Agnew and, later, President Nixon. (Messrs. Agnew and Nixon were the political patrons of Judges Richey and Bork. Although Mr. Agnew would be forced to resign after it became known that he had accepted bribes from personal friends for government favors, Judge Richey had, earlier, at the time of his judicial appointment, publicly acknowledged that he owed his judgeship to Mr. Agnew.)

Although I was represented on this appeal by two of the finest attorneys in Washington, D.C., (Herbert J. Miller, Jr., Esq. and Stephen L. Braga, Esq., of Miller, Cassidy, Larroca & Lewin) Judge Bork preferred to make a mockery of the judicial process (and ingratiate himself with the Post which, while he was writing his opinion, was helping to make things uncomfortable for the new Chief Justice whose nomination hearings were in progress) rather than afford me a full and fair trial.

So that the Post officials would be sure to get his signal, Judge Bork not only sustained the $13,000 sanction imposed by the ever-grateful-to-the-Post Judge Richey but suggested that he, Judge Bork, would like to have added to the amount (Id, 1206). Naturally, this type of judicial language attracted the attention of the District of Columbia Board of Professional Responsibility which opened its own investigation of my conduct which Judge Bork found so harassing and unprofessional.

Fortunately however, the personnel with the Bar group do not need to please the media in the hopes of furthering their own ambitions. After an extensive and exhaustive investigation I was advised by a letter from the Bar Counsel on April 14, 1987 that the conduct for which I was sanctioned was not in any way in violation of the Code of Professional Responsibility.

Francis X. McLaughlin

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IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, MARYLAND

McLAUGHLIN, et ux.,

Plaintiffs,

vs. Law No. 51047

ALBAN, et al.,

Defendants.

Room H-204
The Capitol
Washington, D. C.

September 29, 1983

The deposition of THE HONORABLE THOMAS P. O'NEILL, JR., was taken, pursuant to notice, beginning at 11:00 o'clock, before Joyce Northwood, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

For the Plaintiff:

JAMES L. O'DEA, III
Suite 701
1029 Vermont Ave., N. W.
Washington, D. C. 20005

For the Defendant Cheshire:

WILLIAM E. McDANIELS, ESQ.
GERSON A. ZWEIFACH, ESQ.
Williams & Connolly
Hill Building

bing

Department during the period of time that Johnson was President, and I believe with the Defense Department. And my recollection is that he was offered a job there. Whether he accepted it or not, I don't recall.

Q Would you, today, recommend him for a job or an appointment?

A Would I today?

Yes, I would recommend him today.

Q Do you believe he is qualified for these jobs you have recommended him for in the past?

A I think he's an extremely talented person.

Q Do you know that Mr. McLaughlin had a fishing business in Ireland?

A I'm aware of that.

Q Were you ever involved financially or personally with this business, either directly or indirectly, at anytime

A Not directly or indirectly, in any manner, shape or form.

Q Did you know that Thomas P. O'Neill, III, your son, was at one time a director--

A I'm aware of it now. I was not aware of it at the --when he became a member. I only learned that when I read it in the newspaper.

Mental Health Law Project

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BERNICE WEISSBOURD
Family Focus, Inc., Chicago, Illinois

September 15, 1987

Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20530

Dear Senator Biden:

The undersigned legal organizations, which represent many of our nations's 36 million citizens with disabilities, oppose the confirmation of Robert H. Bork to be a Justice of the United States Supreme Court.

We have carefully considered Judge Bork's decisions, writings and public presentations. Attached is our analysis of them as they relate to the rights of people with disabilities. Based on this review, we conclude that Judge Bork's confirmation would be inimical to the interests of disabled Americans.

We respectfully request that the attached analysis be made a part of the record of the hearings by the Judiciary Committee. These organizations also join our prior request for an opportunity to present testimony before the Committee.

Yours truly,

Norman S. Rosenberg

On behalf of:
Mental Health Law Project
Disability Rights Education and Defense Fund
National Center for Law and the Deaf
National Association of Protection and Advocacy Systems

cc: Members of the Committee on the Judiciary

Mental Health Law Project

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JUDGE BORK AND THE RIGHTS OF DISABLED PEOPLE

The nomination of Robert Bork to the Supreme Court raises grave concerns for the legal rights of disabled people. This paper reviews Judge Bork's philosophy and its implications for disabled people as reflected in his judicial opinions, his scholarly writings and his speeches. We conclude that if his views on constitutional rights, on the right of access to the courts and on constitutional requirements for the administration of public benefit programs prevail, disabled people could find themselves virtually without constitutional protection against victimization based on their disabilities.

Judge Bork's judicial philosophy rests on what may be called radical majoritarianism -- a notion that the executive and legislative branches, representing the majority, may impose on minorities their values, choices and aversions. Except in exceedingly narrow circumstances involving race, he holds that courts must defer to the decisions of the other two branches of government. Judge Bork limits the substantive rights citizens enjoy, leaving no basis to challenge official action. In addition, he restricts the ability of people whose rights may have been violated of the opportunity to bring their cases to the federal court for resolution.

This approach can leave minorities in general and disabled people in particular without judicial protection. Indeed, Judge Bork has been quite explicit in criticizing federal courts for becoming involved in issues concerning the rights of many powerless groups, including institutionalized disabled people:

> With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials: Schools, mental homes, prisons . . . The results of all this have been horrendous. [1]

Such a view has not been adopted by any member of the Supreme Court -- not even Justice Rehnquist or former Chief Justice Burger -- for at least half a century.

The Dilution of Constitutional Rights

Judge Bork believes that constitutional rights do not exist unless they are explicitly mentioned in the text of the Constitution. He has stated, for example, that there is no constitutional right of privacy and that he does not believe any substantive due process rights can be derived from the Constitution. Rather, according to Bork, these rights are based on nothing more than "amorphous generalizations" because "the Constitution itself provides neither textual nor structural guidance" concerning them. Franz v. United States, 712 F.2d 1434, 1438 (Separate Statement of Judge Bork). This view contradicts every substantive due process and privacy case decided in the last 20 years. For example, he believes that Griswold v. Connecticut, 314 U.S. 479 (1965), striking down a law forbidding married couples to obtain

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[1] Bork, R., Speech to South Carolina Bar, January 15, 1983.

contraceptives, and all subsequent cases concerning the right of privacy were illegitimate exercises of judicial power.

While Judge Bork has not specifically mentioned the case, this position would also require him to hold that the Supreme Court's landmark decision in Youngberg v. Romeo, 457 U.S. 307 (1982), was wrongly decided. Romeo held that mentally retarded individuals in state custody have specific, constitutionally guaranteed substantive rights: the rights to adequate food, clothing and shelter, to medical care, to safe conditions and protection from harm, to freedom from undue bodily restraint and to habilitation necessary to fulfill one's rights to safety and freedom from undue restraint. Judge Bork's philosophy would recognize none of them.

Even when rights are recognized through a conventional reading of a constitutional text, Judge Bork often demurs. For example, notwithstanding the great statement of equality in the Fourteenth Amendment that no state may "deny to any person within its jurisdiction the equal protection of the laws," Judge Bork believes the clause applies only to black people and perhaps members of ethnic and religious minorities. For all other people, he does not find the dream and demand of equal treatment in the Constitution of the United States:

> The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme

Court has no principled way of saying which non-racial inequalities are impermissible.[2] (emphasis added).

The consequence of this conclusion, for Judge Bork, is that the majority can impose its prejudices, its values and its morality on minorities with few constraints. In fact, in Judge Bork's view, the very nature of democracy entitles the majority to impose its wishes on a disliked minority. He has written that "when the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason." Dronenberg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (upholding Navy's authority to discharge homosexuals).

It follows that disabled people are stripped of all constitutional rights to equal treatment. According to this view, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), which struck down a municipality's use of zoning authority to exclude a group home for mentally retarded people, was wrongly decided. In that case, the Supreme Court examined the reasons for the city's exclusion of the group home, and found them to be premised on irrational prejudice against and fear of mentally retarded people. But because Judge Bork believes the majority can impose its values and prejudices on any group it dislikes (other than racial and ethnic minorities[3]), he would find no

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[2]Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Journal 1, 11 (1971).

[3]Even with respect to racial minorities, Judge Bork probably has taken a narrower view of the scope of the Fourteenth Amendment than any justice in half a century. Judge Bork has (continued...)

constitutional impediment to the city's actions. No matter how biased or irrational the view of a majority, it can impose them willy-nilly on victims of its choosing.

Put together, his due process and equal protection positions lead to even more extreme results, particularly in the area of state regulation of sexual activity. Because, in his view, no constitutional right of privacy exists, regulation of any sexual conduct infringes a person's rights no more than the regulation of smoke pollution:

> Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. . . . The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.[4]

Free rein in regulation of "sexual gratification," in Judge Bork's view, extends to government authority to sterilize. He has written that the Supreme Court was wrong when, in Skinner v. Oklahoma, 316 U.S. 535 (1942), it unanimously struck down a law requiring certain convicted felons to be sterilized.[5] Even to the extent that, as a court of appeals judge, Bork recognized his

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[3](...continued)
written, for example, that he believes Shelley v. Kraemer, 334 U.S. 1 (1948), where the Supreme Court held that judicial enforcement of racially restrictive covenants in deeds was unconstitutional, was incorrectly decided. Id. at 15.

[4]Id. at 10.

[5]Id. at 12.

obligation to follow Griswold and other Supreme Court cases on privacy rights, he opined that lower court judges could not apply them to contexts other than the specific factual situation in which they arose because the Supreme Court "did not indicate what other activities might be protected by the new right of privacy and did not provide any guidance for reasoning about future claims laid under that right."[6]

Given these views, Judge Bork would have no grounds to oppose a statute requiring sterilization of all mentally disabled people or any nonracial group a legislature wished to prevent from reproducing. Indeed, it is likely that the most infamous disability decision in the Supreme Court's history, Buck v. Bell, 274 U.S. 200 (1927), upholding sterilization of mentally retarded people on eugenic grounds ("society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles is enough.") would be viewed by Bork as correctly decided because it reflected the decision of the majority exercised through the legislature.

The Closing of the Federal Courts

In addition to diluting their constitutional rights, Judge Bork would deprive disabled people of the most important remedy for violation of their remaining rights: their opportunity to bring to the federal courts claims of infringement of rights that even he must concede exist, including those specifically established by federal statute. He has interpreted concepts such as standing and sovereign immunity to prevent suits from being

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[6] Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

heard in the federal courts. And his construction of laws that confer the right to challenge government actions would, if adopted by the Supreme Court, severely impair or even curtail altogether citizens' ability to litigate violations of their rights in the federal courts. Moreover, he has advocated the final step of statutory change that would end the federal courts' jurisdiction to hear cases concerning most of the federal programs that are critically important to disabled people.

These restrictions are based on a notion that the United States Constitution does not give people who, because of poverty or disability, participate in government benefit programs the same kinds of due process rights other citizens have in their relations with government. His views are most apparent in a recent case in which he wrote a vehement dissent, Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987). The issue there was whether Congress had intended the Medicare Part A rule limiting judicial review to claims greater than $1,000 to govern challenges to the constitutionality of the Medicare statute itself. The subsidiary question was whether, if Congress had so intended, it had the constitutional authority to do so.

The majority, applying conventional doctrines, held that Congress did not intend to limit constitutional challenges in cases where at least $1,000 was at stake, but that even if it had wanted to do so, it could not pass an unconstitutional law and then prohibit the courts from reviewing it. Judge Bork dissented. He agreed that Congress could not deprive a person against whom the government was taking an enforcement action of a forum to challenge the constitutionality of the law under which

the government acted. But he added that "the practical necessities of the welfare state" justified excluding recipients of government benefits from such a forum. 816 F.2d at 723. In one extraordinary passage, he read Supreme Court decisions to mean that "for reasons of administrative necessity, constitutional rules apply differently, or may not apply at all, to benefit programs" (emphasis added). Id.

If this theory, utterly at odds with settled legal principles, were adopted as a matter of constitutional law,[7] Congress could set conditions for the receipt of public benefits and appeal of adverse decisions that would violate the rights of recipients, and could then deprive them of the right to litigate the violations. Indeed, this passage suggests that Congress and the states need not provide recipients any due process rights at all in the administration of benefit programs -- a proposition the Supreme Court has for decades rejected.

While this conclusion seems extreme, it is confirmed by Judge Bork's own statements. In Bartlett, the majority expressed a concern that adopting Judge Bork's dissenting view would permit Congress to enact a benefit program available to whites only, with a provision insulating the law from judicial scrutiny. 816 F.2d at 711. Judge Bork's response conceded that very pos-

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[7]This theory illustrates another aspect of Judge Bork's views on constitutional law. He argues consistently against the "creation" of rights not explicitly mentioned in the Constitution on the ground that courts must be faithful to the text and not impose their own values in the guise of constitutional law. But he does not hesitate to find limitations on individual rights that cannot possibly be based on the text, but are based rather on his own personal views -- here the "necessities of the welfare state."

sibility, responding only that "constitutional doctrines cannot be framed to guard against every hypothetical evil. Much must be left to the wisdom and integrity of elected representatives." Id. at 729 n. 15. In short, if a legislature chose to engage in such rampant discrimination, there would be no remedy.

His dissent in Bartlett also offers an example of Judge Bork's efforts to limit litigants' access to courts. There, he articulated the view that waivers of sovereign immunity require unmistakable congressional intent. This pits Bork against a unanimous Supreme Court in Bowen v. City of New York, which held that, notwithstanding the statute's silence on the question, courts have the authority to extend time deadlines for challenges to unlawful practices in the administration of disability programs by the Social Security Administration. Elsewhere, he has very narrowly interpreted the rule allowing associations or organizations to sue on behalf of their members and has otherwise severely restricted rules on standing. Indeed, according to an analysis by the AFL-CIO, in every one of the non-unanimous cases concerning issues of access to the federal courts (e.g., standing to sue) that have been decided by the Court of Appeals on which Judge Bork sits, he voted against allowing that access.

Judge Bork's readiness to close the federal courts to poor and disabled people is evident, too, in his dissenting opinion in Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985), which challenged, under the Federal Administrative Procedure Act, the government's decision to close a shelter for homeless people. That act permits courts to review all federal agency decisions that are not by law "committed to agency discretion." This

exception to the availability of judicial review has always been considered extremely narrow. Yet Judge Bork construed it so broadly that no matter how improperly the government acted, its decision to close the shelter would be untouchable by the courts.[8]

Finally, Judge Bork has advocated closing the federal courts once and for all to claims by disabled and other disadvantaged people by altering the jurisdictional statutes of the federal courts to exclude "welfare state" claims where, in his view, "the issues presented are in large measure legal trivia."[9] He has proposed relegating these claims to special tribunals that would not have the characteristics of the federal court, such as life tenure for judges, procedural rules to protect litigants and the right to appeal all the way to the Supreme Court. As he puts it, "there would be a trial division from which appeals would be funneled to an appellate administrative court, and the litigation would end there."[10]

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[8]In one other case, Judge Bork was required to construe a federal statute in a claim involving disabled people. In Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694 (D.C. Cir. 1985)(denial of rehearing en banc), rev'd sub nom Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986), the question was whether commercial airlines were recipients of federal financial assistance for the purpose of section 504 of the Rehabilitation Act of 1973, as amended (if so, they would be subject to the act's nondiscrimination requirement). Judge Bork opined that the airlines did not directly receive such assistance, so they were not covered. The Supreme Court ultimately accepted this interpretation of the act.

[9]Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 238 (1976). Judge Bork repeated these views in his 1983 speech to the South Carolina Bar, cited at footnote 1.

[10]Id.

What kinds of cases would Judge Bork relegate to this forum? His list is breathtaking, encompassing major environmental laws and virtually every federal statute of concern to a disabled person -- Social Security, Food Stamps, the Federal Employers' Liability Act and the Occupational Safety and Health Act, among others -- and "many prisoners' suits." If such proposals were adopted, along with Judge Bork's views on constitutional rights, it is fair to say that federal courts would no longer hear cases concerning infringement of the rights of a disabled person.

Conclusion

During the past 15 years, disabled people have relied extensively on the courts to protect them from the prejudices of the larger society and from mistreatment that stems from those prejudices. While not entirely hospitable to the claims of disabled people, the Supreme Court has nevertheless unanimously affirmed the existence of their substantive constitutional rights and has demanded that publicly administered programs -- mental institutions, schools, health-care and income-support programs and others -- be subject to due process and equal protection standards. Judge Bork would destroy this consensus. He shows overt hostility to the very underpinnings of these decisions and, indeed, to any attempt to forge protections for disabled people through the United States Constitution.

September 11, 1987

Mental Health Law Project

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October 2, 1987

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Diana Huffman
Staff Director
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Ms. Huffman:

The undersigned organizations urge your opposition to the nomination of Robert Bork to the Supreme Court. We believe the future of America's 36 million citizens with disabilities will be deeply affected by this important decision. During the last 15 years, people with disabilities and the parents of children with disabilities have struggled for recognition of their civil rights. Robert Bork's confirmation to the U.S. Supreme Court could undermine our hard-won victories, and diminish prospects for the work yet to be done.

Our initial concerns about Judge Bork's qualifications stemmed from a review of his positions on access to the courts, original intent, and equal protection as stated in his articles, speeches and judicial opinions. Although Judge Bork retracted some of his previously expressed views on equal protection during last week's hearings, he reaffirmed theories of constitutional interpretation which would not recognize critical constitutional rights of people with disabilities. Moreover, while he committed himself to uphold some decisions with which he disagreed, his testimony does little to allay the fears of a community which as yet has few precedents upon which to rely.

Disability law is a young and still-emerging area of civil rights law. Only recently have traditional notions about people with disabilities been fundamentally challenged. Historically, people with disabilities have been viewed as incapable of functioning in "normal" society, pitiable, and dangerous to themselves and others. As a result, they have been subjected to exclusionary and discriminatory practices in all aspects of life.

Over the course of the last two decades, however, the courts, especially the Supreme Court, have begun to recognize that people with disabilities have rights protected by the Constitution.

Judge Bork's views concerning the role of the courts and the methods for interpreting the Constitution threaten this progress. In 1983, Judge Bork offered to the South Carolina Bar a particularly troublesome analysis of the courts' role:

> With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials: schools, mental homes, prisons . . . . The results of all this have been horrendous.

The disability community is painfully aware that without what Judge Bork terms "adventurism" by conscientious and thoughtful federal judges, many people would still be neglected on the back wards of institutions with little or no right to treatment. It is precisely the willingness of the courts to derive substantive due process rights from the rich history of constitutional law that has offered a new life to people with disabilities. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court held -- with no dissent -- that people with disabilities in institutions have constitutional rights to food, clothing, shelter, medical care, protection from harm and freedom from undue restraint, rights nowhere specifically mentioned in the Constitution. Judge Bork's theory of constitutional law would exclude rights such as these.

Equally disconcerting are Judge Bork's views on the right of the poor and people with disabilities to seek judicial consideration of claims of constitutional violations in the context of public benefit programs. In a dissenting court of appeals opinion regarding the Medicare program (Bartlett v. Bowen, 816 F.2d 695 (D.C.Cir. 1987)), Judge Bork expressed the view that Congress may limit the courts' ability to hear cases related to federal benefit programs, even when a person seeks to challenge the constitutionality of the statute itself. In his view, the plaintiff could be precluded from mounting her First Amendment challenge to a provision of the Medicare Act because "for reasons of administrative necessity, constitutional rules apply differently, or may not apply at all, to benefit programs". His opinion has very disturbing implications for people who are poor or who have disabilities, since it could end the protection of the courts altogether in programs like Food Stamps, Social Security Disability Insurance, SSI, Medicare, Medicaid, Veterans Benefits, and many others.

Indeed, Judge Bork has advocated removing entirely from the federal courts' jurisdiction many of the federal programs that affect people with disabilities, such as Social Security and Medicare. It appears he would close the federal courts to some of the most important entitlement claims of citizens with disabilities.

We are also deeply concerned about the relative vulnerability of still-emerging legislative mandates that have yet to be thoroughly reviewed in the courts. Section 504 of the Rehabilitation Act, enacted by Congress in 1973, bans discrimination on the basis of handicapping condition in federally assisted and federally conducted programs. The Education for All Handicapped Children Act (P.L. 94-142), passed by Congress in 1975, established for the first time the right of all children with disabilities to a free appropriate public education in the least restrictive environment. The case law interpreting these statutes and their regulations is still in the early stages and their effectiveness will depend greatly on future judicial interpretations.

Judge Bork's hesitancy to extend constitutional protections to minorities and his very narrow interpretations of civil rights statutes could halt the progress of the disability civil rights movement and reverse the legislative and judicial victories of the last decade. As a community that has already waited too long to enjoy basic rights most Americans take for granted, we cannot overstate the importance of the decision you are now making.

On behalf of this country's citizens with disabilities, we urge you to reject the nomination of Robert Bork to the U.S. Supreme Court.

Sincerely,

Leonard S. Rubenstein

On behalf of:

ACLD, an Association for Children and Adults with Learning Disabilities
American Association for Counseling and Development
American Association for Partial Hospitalization
The Association for Persons with Severe Handicaps
American Association of Children's Residential Centers
American Association on Mental Deficiency
American Disabled for Accessible Public Transit
American Orthopsychiatric Association
Association for Retarded Citizens - United States
Association on Handicapped Student Service Programs in Post Secondary Education
Center for Law and Social Policy
Disability Rights Education and Defense Fund
Epilepsy Foundation of America
Facing the Challenge
International Association of Psychosocial Rehabilitation Services
Mental Health Law Project
(continued on the next page)

National Alliance of Mental Patients
National Association of Protection and Advocacy Systems
National Center for Law and the Deaf
National Council of Independent Living
National Education Association
National Mental Health Association
National Mental Health Consumers' Association
National Organization for Rare Disorders
National Spinal Cord Injury Association
World Institute on Disability

TESTIMONY OF LEONARD S. RUBENSTEIN,

LEGAL DIRECTOR, MENTAL HEALTH LAW PROJECT

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

CONCERNING THE NOMINATION OF

JUDGE ROBERT H. BORK

TO BE ASSOCIATE JUSTICE

OF THE UNITED STATES SUPREME COURT

OCTOBER 5, 1987

Mr. Chairman:

My name is Leonard Rubenstein. I am Legal Director of the Mental Health Law Project, a non-profit, public interest organization one of whose principal goals over the past 15 years has been to bring people with mentally disabilities under full protection of the constitution and the nation's laws.

This testimony explains in greater detail concerns about Judge Bork, previously articulated by 26 national organizations of people with mental and physical disabilities and their families, advocates, treatment professionals and service providers in a letter submitted to members of the Judiciary Committee. A copy of that letter is attached to this testimony.

The nomination of Robert Bork to the Supreme Court raises grave concerns for the legal rights of disabled people. This paper reviews Judge Bork's philosophy and its implications for disabled people as reflected in his judicial opinions, his scholarly writings and his speeches. We conclude that if his views on constitutional rights, on the right of access to the courts and on constitutional requirements for the administration of public benefit programs prevail, disabled people could find themselves virtually without constitutional protection against victimization based on their disabilities.

Judge Bork's judicial philosophy rests on what may be called radical majoritarianism -- a notion that the executive and legislative branches, representing the majority, may impose on minorities their values, choices and aversions. He holds that courts must generally defer to the decisions of the other two branches of government and that restraints on government action are limited to those rights specifically mentioned in the

constitutional text. In addition, he restricts the ability of people whose rights may have been violated of the opportunity to bring their cases to the federal court for resolution.

This approach can leave minorities in general and disabled people in particular without judicial protection. Indeed, Judge Bork has been quite explicit in criticizing federal courts for becoming involved in issues concerning the rights of many powerless groups, including institutionalized disabled people:

> With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials: Schools, mental homes, prisons . . . The results of all this have been horrendous. [1]

Such a view has not been adopted by any member of the Supreme Court -- not even Justice Rehnquist or former Chief Justice Burger -- for at least half a century.

The Dilution of Constitutional Rights

Judge Bork believes that constitutional rights do not exist unless they are explicitly mentioned in the text of the Constitution. He has stated, for example, that there is no constitutional right of privacy and that he does not believe any substantive due process rights can be derived from the Constitution. Rather, according to Judge Bork, these rights are based on nothing more than "amorphous generalizations" because "the Constitution itself provides neither textual nor structural guidance" concerning them. Franz v. United States, 712 F.2d 1434, 1438 (Separate Statement of Judge Bork). This view contradicts every substantive

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[1] Bork, R., Speech to South Carolina Bar, January 15, 1983.

due process and privacy case decided in the last 20 years. For example, he believes that Griswold v. Connecticut, 314 U.S. 479 (1965), striking down a law forbidding married couples to obtain contraceptives, and all subsequent cases concerning the right of privacy were illegitimate exercises of judicial power.

While Judge Bork has not specifically mentioned the case, this position necessarily leads to the conclusion that the Supreme Court's landmark decision in Youngberg v. Romeo, 457 U.S. 307 (1982), was wrongly decided. Romeo held that mentally retarded individuals in state custody have specific, constitutionally guaranteed substantive rights: the rights to adequate food, clothing and shelter, to medical care, to safe conditions and protection from harm, to freedom from undue bodily restraint and to habilitation necessary to fulfill one's rights to safety and freedom from undue restraint. Judge Bork's philosophy would recognize none of them.

Even when rights are recognized through a conventional reading of a constitutional text, Judge Bork often demurs. For example, notwithstanding the great statement of equality in the Fourteenth Amendment that no state may "deny to any person within its jurisdiction the equal protection of the laws," Judge Bork in the past argued that the clause applies only to black people and perhaps members of ethnic and religious minorities:

> The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has

no principled way of saying which non-racial inequalities are impermissible.[2] (emphasis added).

The consequence of this conclusion, for Judge Bork, is that the majority can impose its prejudices, its values and its morality on minorities with few constraints. In fact, in Judge Bork's view, the very nature of democracy entitles the majority to impose its wishes on a disliked minority. He has written that "when the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason." Dronenberg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (upholding Navy's authority to discharge homosexuals).

It follows that disabled people are stripped of all constitutional rights to equal treatment. According to this view, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), which struck down a municipality's use of zoning authority to exclude a group home for mentally retarded people, was wrongly decided. In that case, the Supreme Court examined the reasons for the city's exclusion of the group home, and found them to be premised on irrational prejudice against and fear of mentally retarded people. But if the majority can impose its values and prejudices on any group it dislikes (other than racial and ethnic minorities), there would be no constitutional impediment to the city's actions.

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[2]Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Journal 1, 11 (1971).

Judge Bork has testified that his views on equal protection have now changed, so that he recognizes that all people are subjects to its mandate. He further stated that he would apply the rational basis test to all claims of a violation of the guarantee of equal protection of the law. He did not address the critical question how he would apply the test, and we have grave concerns about his approach to that fluid standard, especially in view of his general view that it is rational for a majority to impose its wishes on a minority.

Put together, his due process and equal protection positions lead to even more disturbing implications, particularly in the area of state regulation of sexual activity. Because, in his view, no constitutional right of privacy exists, regulation of any sexual conduct infringes a person's rights no more than the regulation of smoke pollution:

> Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. . . . The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.[3]

Free rein in regulation of "sexual gratification," in Judge Bork's view, extends to government authority to sterilize. He has written that the Supreme Court was wrong when, in Skinner v. Oklahoma, 316 U.S. 535 (1942), it unanimously struck down a law

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[3] Id. at 10.

requiring certain convicted felons to be sterilized.[4] Even to the extent that, as a court of appeals judge, Bork recognized his obligation to follow Griswold and other Supreme Court cases on privacy rights, he opined that lower court judges could not apply them to contexts other than the specific factual situation in which they arose because the Supreme Court "did not indicate what other activities might be protected by the new right of privacy and did not provide any guidance for reasoning about future claims laid under that right."[5]

Given these views, we are greatly concerned about Judge Bork's willingness to protect the rights of disabled people to sexual expression and to recognize rights which would prevent their involuntary sterilization.

The Closing of the Federal Courts

In addition to diluting their constitutional rights, Judge Bork would deprive disabled people of the most important remedy for violation of their remaining rights: their opportunity to bring to the federal courts claims of infringement of rights that even he must concede exist, including those specifically established by federal statute. He has interpreted concepts such as standing and sovereign immunity to prevent suits from being heard in the federal courts. And his construction of laws that confer the right to challenge government actions would, if adopted by the Supreme Court, severely impair or even curtail altogether citizens' ability to litigate violations of their

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[4] Id. at 12.

[5] Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

rights in the federal courts. Moreover, he has advocated the final step of statutory change that would end the federal courts' jurisdiction to hear cases concerning most of the federal programs that are critically important to disabled people.

These restrictions are based on a notion that the United States Constitution does not give people who, because of poverty or disability, participate in government benefit programs the same kinds of due process rights other citizens have in their relations with government. His views are most apparent in a recent case in which he wrote a vehement dissent, Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987). The issue there was whether Congress had intended the Medicare Part A rule limiting judicial review to claims greater than $1,000 to govern challenges to the constitutionality of the Medicare statute itself. The subsidiary question was whether, if Congress had so intended, it had the constitutional authority to do so.

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that "for reasons of administrative necessity, constitutional rules apply differently, or may not apply at all, to benefit programs" (emphasis added). Id.

If this theory, utterly at odds with settled legal principles, were adopted as a matter of constitutional law,[6] Congress could set conditions for the receipt of public benefits and appeal of adverse decisions that would violate the rights of recipients, and could then deprive them of the right to litigate the violations. Indeed, this passage suggests that Congress and the states need not provide recipients any due process rights at all in the administration of benefit programs -- a proposition the Supreme Court has for decades rejected.

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Id. at 729 n. 15. In short, if a legislature chose to engage in such rampant discrimination, there would be no remedy.

His dissent in Bartlett also offers an example of Judge Bork's efforts to limit litigants' access to courts. There, he articulated the view that waivers of sovereign immunity require unmistakable congressional intent. This pits Bork against a unanimous Supreme Court in Bowen v. City of New York, which held that, notwithstanding the statute's silence on the question, courts have the authority to extend time deadlines for challenges to unlawful practices in the administration of disability programs by the Social Security Administration. Elsewhere, he has very narrowly interpreted the rule allowing associations or organizations to sue on behalf of their members and has otherwise severely restricted rules on standing.

Judge Bork's readiness to close the federal courts to poor and disabled people is evident, too, in his dissenting opinion in Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985), which challenged, under the Federal Administrative Procedure Act, the government's decision to close a shelter for homeless people. That act permits courts to review all federal agency decisions that are not by law "committed to agency discretion." This exception to the availability of judicial review has always been considered extremely narrow. Yet Judge Bork construed it so broadly that no matter how improperly the government acted, its

decision to close the shelter would be untouchable by the courts.[7]

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Conclusion

During the past 15 years, disabled people have relied extensively on the courts to protect them from the prejudices of the larger society and from mistreatment that stems from those prejudices. While not entirely hospitable to the claims of disabled people, the Supreme Court has nevertheless unanimously affirmed the existence of their substantive constitutional rights and has demanded that publicly administered programs -- mental institutions, schools, health-care and income-support programs and others -- be subject to due process and equal protection standards. Judge Bork would destroy this consensus. He shows overt hostility to the very underpinnings of these decisions and, indeed, to any attempt to forge protections for disabled people through the United States Constitution.

For these reasons, we urge that Judge Bork not be confirmed as Associate Justice of the Supreme Court of the United States.

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October 2, 1987

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BERNICE WEISSBOURD
Family Focus, Inc., Chicago, Illinois

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20530

Dear Senator Biden:

The undersigned organizations urge your opposition to the nomination of Robert Bork to the Supreme Court. We believe the future of America's 36 million citizens with disabilities will be deeply affected by this important decision. During the last 15 years, people with disabilities and the parents of children with disabilities have struggled for recognition of their civil rights. Robert Bork's confirmation to the U.S. Supreme Court could undermine our hard-won victories, and diminish prospects for the work yet to be done.

Our initial concerns about Judge Bork's qualifications stemmed from a review of his positions on access to the courts, original intent, and equal protection as stated in his articles, speeches and judicial opinions. Although Judge Bork retracted some of his previously expressed views on equal protection during last week's hearings, he reaffirmed theories of constitutional interpretation which would not recognize critical constitutional rights of people with disabilities. Moreover, while he committed himself to uphold some decisions with which he disagreed, his testimony does little to allay the fears of a community which as yet has few precedents upon which to rely.

Disability law is a young and still-emerging area of civil rights law. Only recently have traditional notions about people with disabilities been fundamentally challenged. Historically, people with disabilities have been viewed as incapable of functioning in "normal" society, pitiable, and dangerous to themselves and others. As a result, they have been subjected to exclusionary and discriminatory practices in all aspects of life.

Over the course of the last two decades, however, the courts, especially the Supreme Court, have begun to recognize that people with disabilities have rights protected by the Constitution.

Judge Bork's views concerning the role of the courts and the methods for interpreting the Constitution threaten this progress. In 1983, Judge Bork offered to the South Carolina Bar a particularly troublesome analysis of the courts' role:

> With a degree of adventurism -- some might call it imperialism -- unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials: schools, mental homes, prisons . . . . The results of all this have been horrendous.

The disability community is painfully aware that without what Judge Bork terms "adventurism" by conscientious and thoughtful federal judges, many people would still be neglected on the back wards of institutions with little or no right to treatment. It is precisely the willingness of the courts to derive substantive due process rights from the rich history of constitutional law that has offered a new life to people with disabilities. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court held -- with no dissent -- that people with disabilities in institutions have constitutional rights to food, clothing, shelter, medical care, protection from harm and freedom from undue restraint, rights nowhere specifically mentioned in the Constitution. Judge Bork's theory of constitutional law would exclude rights such as these.

Equally disconcerting are Judge Bork's views on the right of the poor and people with disabilities to seek judicial consideration of claims of constitutional violations in the context of public benefit programs. In a dissenting court of appeals opinion regarding the Medicare program (Bartlett v. Bowen, 816 F.2d 695 (D.C.Cir. 1987)), Judge Bork expressed the view that Congress may limit the courts' ability to hear cases related to federal benefit programs, even when a person seeks to challenge the constitutionality of the statute itself. In his view, the plaintiff could be precluded from mounting her First Amendment challenge to a provision of the Medicare Act because "for reasons of administrative necessity, constitutional rules apply differently, or may not apply at all, to benefit programs". His opinion has very disturbing implications for people who are poor or who have disabilities, since it could end the protection of the courts altogether in programs like Food Stamps, Social Security Disability Insurance, SSI, Medicare, Medicaid, Veterans Benefits, and many others.

Indeed, Judge Bork has advocated removing entirely from the federal courts' jurisdiction many of the federal programs that affect people with disabilities, such as Social Security and Medicare. It appears he would close the federal courts to some of the most important entitlement claims of citizens with disabilities.

We are also deeply concerned about the relative vulnerability of still-emerging legislative mandates that have yet to be thoroughly reviewed in the courts. Section 504 of the Rehabilitation Act, enacted by Congress in 1973, bans discrimination on the basis of handicapping condition in federally assisted and federally conducted programs. The Education for All Handicapped Children Act (P.L. 94-142), passed by Congress in 1975, established for the first time the right of all children with disabilities to a free appropriate public education in the least restrictive environment. The case law interpreting these statutes and their regulations is still in the early stages and their effectiveness will depend greatly on future judicial interpretations.

Judge Bork's hesitancy to extend constitutional protections to minorities and his very narrow interpretations of civil rights statutes could halt the progress of the disability civil rights movement and reverse the legislative and judicial victories of the last decade. As a community that has already waited too long to enjoy basic rights most Americans take for granted, we cannot overstate the importance of the decision you are now making.

On behalf of this country's citizens with disabilities, we urge you to reject the nomination of Robert Bork to the U.S. Supreme Court.

Sincerely,

Leonard S. Rubenstein

On behalf of:

ACLD, an Association for Children and Adults with Learning Disabilities
American Association for Counseling and Development
American Association for Partial Hospitalization
The Association for Persons with Severe Handicaps
American Association of Children's Residential Centers
American Association on Mental Deficiency
American Disabled for Accessible Public Transit
American Orthopsychiatric Association
Association for Retarded Citizens - United States
Association on Handicapped Student Service Programs in Post Secondary Education
Center for Law and Social Policy
Disability Rights Education and Defense Fund
Epilepsy Foundation of America
Facing the Challenge
International Association of Psychosocial Rehabilitation Services
Mental Health Law Project
(continued on the next page)

National Alliance of Mental Patients
National Association of Protection and Advocacy Systems
National Center for Law and the Deaf
National Council of Independent Living
National Education Association
National Mental Health Association
National Mental Health Consumers' Association
National Organization for Rare Disorders
National Spinal Cord Injury Association
World Institute on Disability

STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
("MALDEF")

By

ANTONIA HERNANDEZ
PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN OPPOSITION TO THE
CONFIRMATION OF ROBERT H. BORK
TO THE UNITED STATES SUPREME COURT

100th CONGRESS
1st SESSION
October 5, 1987

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of Robert H. Bork as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the basis of MALDEF's opposition to Robert H. Bork; (2) Judge Bork's written record of antagonism to many of the cornerstones of modern civil rights law which protect the rights of Hispanics; and (3) Judge Bork's continued opposition to the rights of Hispanics as demonstrated by his testimony before this Committee.

I. MALDEF's Opposition to Judge Bork

MALDEF's Board of Directors is geographically and politically diverse. Our Board Members reside throughout the United States: from California east to New York, from Texas north to Illinois, and from many states in between. Some are business leaders, others are lawyers; some are Republicans and

others are Democrats. All are committed to the civil rights of Hispanics.

Notwithstanding the diversity on our Board, MALDEF's Board of Directors voted unanimously this summer to oppose the confirmation of Judge Bork.

In order to understand the unanimity of this vote and the fear that Hispanics have of Judge Bork, this Committee as well as the full Senate should understand that the scope of discrimination practiced against Mexican Americans and other Hispanics primarily in the Southwest was -- for more than a century -- nearly as severe as if not equally as severe as the discrimination practiced against Blacks primarily in the South.

This discrimination dates back to the period following the 1948 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican origin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

The first to go was our land. The next was the effective eradication of our right to vote. Government-enforced and private segregation followed, as did brutality and lynchings. This history is sordid, and it is summarized in the introduction -- titled "Origins" -- to a MALDEF report, Diez Anos. This introduction is attached hereto as an appendix.

Although the racial injustice suffered by Hispanics during this period was parallel to that suffered by Blacks, we -- like America's Blacks -- were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks before the Supreme Court in Brown v. Board of Education of Topeka, 347 U.S. 383 (1954), unanimously held school segregation unconstitutional, the Court unanimously decided in Hernandez v. Texas, 347 U.S. 475

(1954), that the exclusion of Mexican Americans from juries in Texas violated the Constitution's equal protection clause. In the following years, it continued to be the Supreme Court -- and thereafter also Congress -- that began to restore our basic civil rights.

With this history in mind, MALDEF's Board of Directors voted unanimously this summer to oppose the confirmation of Judge Bork, for two reasons. First, Judge Bork's extensive writings and statements demonstrated his steadfast antagonism to the cornerstones of modern civil rights law, and thus his steadfast opposition to the civil rights of Hispanics. Second, with the ideological balance of the Supreme Court at issue, a nominee with Judge Bork's record would tip the Court against the civil rights of Hispanics.

II. Judge Bork's Written Record of Antagonism to Civil Rights

In various writings and statements prior to his testimony before this Senate Judiciary Committee, Robert Bork had repeatedly made clear his steadfast antagonism to many of the cornerstones of modern civil rights law, and, as such, his steadfast opposition to the rights of Hispanics. The following examples are illustrative.

A. Voting Rights

In the extremely important area of voting rights, two of the most celebrated decisions of the Warren Court were the seminal "one-person one-vote" reapportionment decisions in Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964). These decisions and their progeny have been critical to the ability of Hispanic citizens to secure political representation. Although these decisions quickly won widespread acceptance as a matter of fundamental constitutional law, they have been opposed by Robert Bork. In fact, in his now-famous 1971 law review article, Judge Bork wrote that "Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument." See Bork, "Neutral Principles," 47 Indiana Law Review 1, 18 (1971).

In another important voting rights case, Harper v. Virginia

State Board of Elections, 383 U.S. 663 (1966), the Supreme Court struck down Virginia's poll tax law, a classic means of disenfranchising minority and poor voters, as unconstitutional under the Fourteenth Amendment. This decision too has been challenged by Judge Bork. In his view, there simply was "no evidence or claim of racial discrimination." See Hearings Before the Senate Committee on the Judiciary on the Confirmation of Robert Bork as Solicitor General, 93rd Cong., 1st Sess. 17 (1973).

As part of the Voting Rights Act of 1965, Congress banned the use of English literacy tests, another classic means of disenfranchising Hispanic and other minority voters, in order to protect the right to vote. This ban on English literacy tests was upheld by the Supreme Court the following year in Katzenbach v. Morgan, 384 U.S. 641 (1966). Several years later, the Supreme Court unanimously upheld Congress' similar ban on all literacy tests, Oregon v. Mitchell, 400 U.S. 112 (1970). According to Judge Bork, both of these decisions were wrongly decided. In fact, in Judge Bork's view, "each of these decisions represents very bad, indeed pernicious, constitutional law." See Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary on S. 158, 97th Cong., 1st Sess. 310, 314 (1981).

B. Affirmative Action

The Supreme Court's many decisions on affirmative action, beginning with Regents of the University of California v. Bakke, 438 U.S. 265 (1978), have upheld affirmative action for Hispanics and other minorities in a variety of contexts. Most of these decisions were 5-4 decisions with former Justice Powell in the majority, and often with Justice Powell writing the majority opinion or the swing-vote opinion as in Bakke. Judge Bork, in contrast, is an opponent of affirmative action. Commenting on former Justice Powell's swing-vote opinion in Bakke, Judge Bork argued that, "in constitutional terms, his argument is not ultimately persuasive." See Bork, "The Unpersuasive Bakke Decision," Wall Street Journal (July 21, 1978). In fact, Judge Bork also argued that the constitutional grounding of affirmative

action "offends both ideas of common justice and the Fourteenth Amendment's guarantee of equal protection." Id.

C. Civil Rights Remedies

In 1972, the Nixon Administration advocated and sought enactment of legislation severely curtailing the school desegregation remedies which the Supreme Court had approved as constitutionally necessary to cure violations of the Fourteenth Amendment, and which have been necessary to improve the inferior education provided to Hispanic and other minority students. Hundreds of law professors expressed the view that the legislation was unconstitutional under Article III of the Constitution. Only two law professors supported the constitutionality of this legislation. One was Robert Bork. See Hearings Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Educational Opportunity Act of 1972, 92nd Cong., 2nd Sess. (1972).

Four years later, during the Presidential primary campaigns, Solicitor General Bork drafted a brief for the United States urging the Supreme Court to grant review to the Boston school desegregation case and to curtail the school desegregation remedies in that case. In an unusual administrative step, Robert Bork's proposal was overruled by Attorney General Edward Levi. No brief was filed. The Supreme Court declined review. See Orfield, Must We Bus? 352-53 (Brookings, 1978).

Also as Solicitor General, Robert Bork filed a brief in the Supreme Court attacking the imposition of interdistrict fair housing remedies favoring minorities, even though the federal government had participated in the racially discriminatory placement of segregated public housing. Bork lost unanimously. Hills v. Gautreaux, 425 U.S. 284 (1976).

D. Language Discrimination

Of special concern to Hispanics is the growing "English-only" movement which runs contrary to constitutional guarantees. For example, in Meyer v. Nebraska, 262 U.S. 390 (1923), a case of extraordinary importance today in challenging natavist English-only legislation, the Supreme Court struck down as violative of substantive due process under the Fourteenth Amendment a state

statute which barred the teaching of any education course in any language other than English. As an opponent of substantive due process, Robert Bork has argued that Meyer was "wrongly decided." See Bork, "Neutral Principles," 47 Indiana Law Review 1, 11 (1971).

E. Other Fundamental Issues

Robert Bork also disagrees with other fundamental principles of constitutional law. For example, Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Supreme Court held that the Fourteenth Amendment prohibits state court enforcement of racially restrictive covenants in the sale of property, was a landmark case not only because of its holding but also because it was the first case in which the Solicitor General filed an amicus brief in a civil rights case. Opposing both the amicus position of the United States and the decision by the Supreme Court, Judge Bork has forcefully argued that there is no constitutional basis for the Shelley decision. See Bork, "Neutral Principles," 47 Indiana Law Journal 1, 15-17 (1971).

The first of the modern civil rights statutes enacted to forbid segregation in the public and private sectors was the omnibus Civil Rights Act of 1964, which had been introduced by President Kennedy and which was enacted after Congress overcame a Southern filibuster. A key portion of that Act is Title II, which outlaws discrimination at lunch counters, in parks, and in other places of public accommodation. Writing in opposition to that legislation in 1963, Judge Bork argued that the proposed law was "improper," that it was "legislation by which the morals of the majority are self-righteously imposed upon a minority," that it was an unwarranted "departure from freedom of the individual to choose with whom he will deal," that it was thus premised upon "a principle of unsurpassed ugliness," and that its enactment was sought by a "mob coercing and disturbing other private individuals." See Bork, "Civil Rights -- A Challenge," The New Republic (Aug. 31, 1963). Although Bork without remorse blithely recanted his opposition a decade later during his confirmation hearings on his nomination as Solicitor General, it must be kept in mind that Bork in 1963 was no untutored youth but instead was

a 35-year-old Yale law professor. Equally to the point, this is the only position antagonistic to individual rights which Bork had recanted prior to his testimony several weeks ago before the Senate Judiciary Committee.

III. Judge Bork's Continued Opposition to the Civil Rights of Hispanics

Through his testimony during his confirmation hearings before this Senate Judiciary Committee, Judge Bork recanted a number of his most controversial views but he dug himself in even deeper as an extreme opponent of the fundamental constitutional and civil rights which protect the rights of Hispanics and of other minorities. He reaffirmed virtually all of his previous positions antagonistic to civil rights. And he stated several new and deeply disturbing positions.

A. Continued Opposition to Constitutional Rights

Robert Bork, amazingly, reaffirmed most of his previous positions. For example, with regard to the Supreme Court's equal protection decisions in such cases as Baker v. Carr and Reynolds v. Sims requiring "one-person one-vote" -- decisions which have guaranteed fair political representation -- Judge Bork declared that "one-man one-vote is a fiasco." Transcript at 206 (Sept. 15, 1987). As to the Court's invalidation of poll taxes under the equal protection clause in Harper v. Virginia State Board of Elections, Judge Bork argued that this decision was "hard to square with our constitutional history." Transcript at 199 (Sept. 15, 1987). With regard to Judge Bork's vigorous disagreement with Katzenbach v. Morgan in which the Supreme Court upheld Congress' banning of English literacy tests for voting, Judge Bork reaffirmed that his "views on Katzenbach v. Morgan have not changed." Transcript at 71 (Sept. 16, 1987). And, as to state court enforcement of racially restrictive covenants in the sale of property, which was held unconstitutional under the equal protection clause in Shelley v. Kraemer, Judge Bork continued to argue that there was and is no constitutional basis for the Supreme Court's decision, Transcript at 125-27, 203-04 (Sept. 15, 1987); he added, surprisingly, that "it is fortunate that the rationale upon which it was decided was not extended,"

Transcript at 203 (Sept. 15, 1987).

B. Little or No Equal Protection

In addition to continuing his opposition to the cornerstones of the constitutional guarantees under the Fourteenth Amendment's equal protection clause, Judge Bork startlingly announced that Hispanics, Blacks, and other minorities should not be specially protected by the Fourteenth Amendment. According to Judge Bork's new theory, government discrimination against Hispanics and other minorities should no longer be subjected to strict scrutiny requiring a compelling interest for any such discrimination. Instead, according to Judge Bork, any such discrimination would be constitutional so long as there was any reasonable basis for it. Judge Bork's reasonable-basis test is akin to the extremely lenient reasonable-basis test which currently is not applicable to discrimination against Hispanics and other minorities, but which is applicable to nonracial distinctions such as age or wealth. According to Judge Bork's theory, Hispanics would lose the protection provided by the compelling-interest test, under which intentional discrimination is always found to be unconstitutional; discrimination against Hispanics instead would be judged under a reasonable basis test, under which challenged discrimination is almost always upheld as constitutional. To illustrate the significance of this shift, it should be recalled that enforced segregation was upheld in Plessy v. Ferguson, 163 U.S.537, 550-51 (1896), because eight Justices found it to be reasonable. Judge Bork's position would very likely compel the overruling of -- among hundreds of other cases -- MALDEF's victory in Plyler v. Doe, 457 U.S. 202 (1982), where the Supreme Court, in a 5-4 decision with Justice Powell in the majority, held that it is a violation of the equal protection clause for a state to deny undocumented children a free public education.

C. No Protection From Federal Government Discrimination

Possibly even more remarkable, Judge Bork announced that he disagreed with the Supreme Court's decision in Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). In Bolling, the Court

held school segregation in the District of Columbia unconstitutional by applying equal protection principles to the federal government through the due process clause of the Fifth Amendment. This unanimous decision, which has been adhered to in dozens of decisions in the more than thirty years since Bolling was decided, has effectively barred the federal government from engaging in racial or national origin discrimination. Although Judge Bork testified at his confirmation hearings that he would not now overrule Bolling, Transcript at 154 (Sept. 16, 1987), he nevertheless expressed his constitutional disagreement with Bolling and its progeny on the ground that equal protection principles do not apply to the federal government. In Judge Bork's world, it is perfectly constitutional for the federal government to discriminate against Hispanics, Blacks, and other minorities.

Conclusion

For the foregoing reasons, Judge Robert H. Bork should not be confirmed as an Associate Justice of the United States Supreme Court.

APPENDIX:

Introduction to Diez Anos

ORIGINS

If the land of the Southwest could speak, it would have an amazing story to tell. The characters would come from that rich mixture of Indian, European, and American races and cultures now known as Mexican American. The story would tell of a people who were conquered and brutally subjugated but who carried on a prolonged and persistent battle to maintain their dignity and regain their own human rights.

For ten years, the Mexican American Legal Defense and Educational Fund has played a critical role in the effort to gain equal treatment and equal opportunity for Chicanas and Chicanos in the United States.

To the Nahua peoples, who were among the Indian forebears of today's Mexican Americans, the southwestern part of the United States was the home of "Aztlán," or "the place of the herons." This was known as the ancient birthplace of the highly developed Nahua cultures. After the conquest by Spain in the 1500's, the Southwest became the northern reaches of New Spain and then of Mexico when independence from the European power was finally won.

The rhythm of life varied from place to place in the arid plains and fertile valleys of Northern Mexico: ranches in Texas were run by the "vaquero" forerunners of American cowboys; present-day New Mexico was populated by farmers and sheep or cattle grazers; and California offered lumber-rich forests and a wealth of minerals to its inhabitants. The pueblos, ranchos, farms, and mission settlements which characterized the area were laced together by the Spanish-Catholic cultural bond which they shared.

From Mexico to the United States

The expansionistic fervor of the newly-forming United States led to an influx of Anglo settlers in the early 1800's. They began to covet the rich resources of the region, and the fight was soon on to turn Northern Mexico into the United States. Tensions flared into full-fledged war culminating in the 1848 Treaty of Guadalupe-Hidalgo which ceded Arizona, Texas, California, New Mexico, Colorado, and parts of Utah and Nevada to the United States for $15 million.

Article IX of the Treaty guaranteed to Mexican-origin people "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution . . . free enjoyment of their liberty and property, and . . . free exercise of their religion without restrictions." Instead, what the once-Mexican population received was more than a century of subjugation.

The Land-Grab

The first thing to go was the land. Legislative, financial, and other maneuvers were used to deprive Mexicans of their ranches and farms. In New Mexico, heavy taxes were placed on land. Many Mexicans lacked the money to pay, and sold their lands to Anglos at auction. Soon after, the high tax levies were abolished. In some areas, Mexicans were suddenly required to register their land. Since notice of this fact was sparsely posted, many failed to meet the deadline and lost vast estates.

An early encounter with land-hungry Texas authorities was described by Chicano scholar, Americo Paredes, "The Cerdas were prosperous ranchers near Brownsville, but it was their misfortune to live next to one of the 'cattle barons' who was not through expanding yet. One day, three Texas Rangers . . . 'executed' the elder Cerda and one of his sons as cattle rustlers. The youngest son fled across the river, and thus the Cerda ranch was vacated." According to an eyewitness, when the remaining son returned to Brownsville, he was stalked "like a wild animal" and shot down by a Ranger.

Political Exclusion

The newly-American Mexicans were not familiar with United States politics and politicians did nothing to educate them. A small group of Anglos, who arrived in El Paso, Texas after the war, immediately took control of local politics. They "managed" the Mexican vote through agents who were rewarded by patronage. By 1870, El Paso had 12,000 inhabitants. Only 80 of these were Anglos, yet most of the elected offices and the county's wealth were controlled by Anglo-Americans.

In California, Mexican-origin people were crowded out of the State Legislature until, by the 1880's, no Spanish-surnamed people could be found in public office. As early as 1856, Democratic party bosses called a special convention in Los Angeles to consider splitting the county in two to increase Anglo political influence. It was the beginning of gerrymandering which still limits the political voice of the Chicano community.

School Discrimination

Mexican American children were discouraged from attending school. Before 1938 "no Mexican Americans had attended junior or senior high school" in Pecos, Texas, according to a 1969 federal government study. Reliable community contacts revealed that, prior to that time, "there was a policy of not permitting Mexican Americans to go beyond sixth grade."

Those Chicanos who did manage to gain an education did so in separate "Mexican Schools." A 1925 Texas Educational Commission described a typical example, "It was a dilapidated 2 or 3 room building. The toilets were unscreened and the grounds were poorly kept." Inferior physical facilities were not the only evidence of inequality. San Juan, Texas schools in 1927 paid Anglo grammar school teachers three times the wages of Mexican School teachers, despite the fact that the Mexican grammar school was twice as large as the Anglo facility.

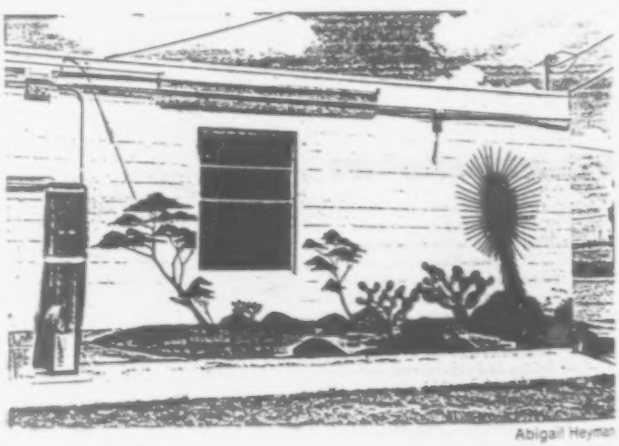
By the end of the 1920's, according to historian Charles Wollenberg, Chicanos were the most segregated group in California public schools. This practice, according to a 1929 education study, was "based largely on the theory that the Mexican is a menace to the health and morals of the rest of the community." Fifty years later, Chicanos would still be more concentrated in segregated schools than any other minority in the state.

Job Discrimination

Deprived of virtually any means of building a decent economic base, the Mexican American population was forced into the employ of the newly-empowered Anglos. Nineteenth-century California legislator G. B. Tingley expressed the prevailing attitude toward Mexican-origin workers, "Vicious, indolent, and dishonest . . . with habits of life low and degraded; an intellect but one degree above the beast of the fields and not susceptible of elevation; all these things combined render such a class of human beings a curse to any enlightened community."

During the 1800's many Chicanos worked 12 hours a day, 6 days a week in Arizona mines, yet they received only half the wages paid to Anglos. "Mexican work" was always the lowliest and most poorly paid.

Chicano farmworkers in Texas were not considered human beings at all. According to historian Pauline Kibbe, who wrote in 1946, they were "but a species of farm implement that comes mysteriously into being coincident with the maturing of the cotton, that requires no upkeep or special consideration during the period of its usefulness, needs no protection from the elements, and when the crop has been harvested, vanishes into the limbo of forgotten things — until the next harvest season rolls around."



Abigail Heyman

Southwest Brutality

King Fisher, the famous Texas gunman, was once asked how many notches he had on his gun. He replied, "Thirty-seven — not counting Mexicans." The flip remark was a serious indication of the low value that was, and still is, placed on Mexican American life in the Southwest. In the late 1800's, Senator Dwyer recounted a typical incident, "In passing through Bee County, we heard of a Mexican, a quiet citizen, who had been brutally murdered . . . by several Americans because the Mexican would not go and play the fiddle for them."

Lynchings and murders of Chicanos became so common in California and Texas that, in 1912, the Mexican Ambassador formally protested the mistreatment of Mexicans and cited a number of brutal incidents that had recently taken place. A series of brutal Texas assaults on Chicanos were listed in *The Nation* in 1922 and George Marvin in *World's Work* described the prevailing situation near the border, "the killing of Mexicans . . . in these last four years is almost incredible . . . Some Rangers have degenerated into common man-killers. There is no penalty for killing, for no jury along the border would ever convict a white man for shooting a Mexican."

Abuse of Chicanos by Rangers and police continued through the 1930's. In 1943, according to the Los Angeles *Herald Express*, two hundred Navy men, angered by scuffles with barrio youth, commandeered a taskforce of taxicabs and began attacking zootsuited Chicanos in East Los Angeles. *Time* Magazine described the scene: "The LAPD (Los Angeles Police Department) practice was to accompany the caravan in police cars, watch the beatings, and jail the victims. During the attacks, Mexican American boys were dragged from the theatres, stripped of their clothing, beaten, and left naked on the streets." Police did nothing to stop the attacking Navy men.

Southwest Justice

Courts of law have been a fruitless source of justice for Mexican American victims of such abuses. In 1947, for example, a 19-year-old Chicano boy was convicted of murder in Hudabeth County, Texas, even though he was blind, mentally retarded, retaliating to an attack on his aging father, and was physically unable to have the legally necessary intent to justify a finding of first-degree murder.

Despite these circumstances, an all-white jury found the boy guilty of first-degree murder and sentenced him to death. On appeal, the boy's attorney charged that he had not been tried by a jury of his peers, pointing out that though Hudabeth County was 50% Mexican American, no Chicano had ever served on a jury. He cited a Supreme Court ruling that outlawed exclusion of blacks from juries. The appeals court held that the 14th Amendment did not protect Mexican Americans in the same way and the boy was executed later that year.

When UFW farmworkers struck in South Texas in 1967, Texas Rangers led by Captain A. Y. Allee harrassed and brutalized the strikers. As news reached Allee that an injunction had been filed against him, he bragged that he had been sued many times but had never received an official reprimand.

A few years later, police went to the house of 12-year-old Santos Rodriguez and picked him up for questioning about a service station robbery. As Rodriguez sat in the front seat of a Dallas squad car, police officer Darrel Cain placed a revolver to the boy's head and started shooting "Russian Roulette" style. The first shot was blank; the second bullet entered the boy's head and killed him. Cain received a five-year sentence for the murder from a jury in Texas, a death-penalty state.

The Mexican American Workforce

By the late 19th and early 20th Centuries, Mexican-origin natives and an increasing number of Mexican immigrants were becoming an important factor in the economic growth of the Southwest. Industrialism was growing and cheap labor was needed by farm, cattle, lumber, and other industries. The decline of ruralism in Mexico and the Mexican Revolution of 1910 brought Mexican immigrants to the States to look for work. In the early 1920's the Immigration Act of 1917 was temporarily suspended and Mexican immigrant workers were welcomed into the country to provide needed labor.

From 1900 to 1921, 40% of the nation's fruit and truck crops were produced by a labor force of 65% - 85% Mexicans; 60% of mining labor was Mexican and between 60% - 90% of section and extra gangs on 19 western railroads were Mexicans. These workers were excluded from unions while the best-paying jobs went to union members. Even with all children and adults working, Chicano families frequently made less than they needed to feed themselves.

With the Depression in the Thirties came resentment against Mexican workers who were accused of depriving Americans of needed jobs. Mass deportations began and over 400,000 persons were shipped back to Mexico, close to half of whom were citizens. When farmworkers were later needed to fill the labor shortage created by World War II, the Government's "Bracero" program was created and, again, large numbers of Mexican laborers were channeled into the United States.

Mexican-origin workers made a crucial contribution to the building of the Southwest, but they received very little in return.

The Chicano Civil Rights Battle: MALDEF's Roots

The vocal Chicano civil rights movement of the 1960's and 1970's is the fruit of a long legacy of Chicanos' efforts to fight their subjugation. Some of the first struggles for equal rights came in the form of riots against oppressive authorities and strikes by Mexican American laborers.

The first community welfare organizations or "mutualistas" sprang up as early as 1873 and spread throughout the Southwest. These were primarily social organizations, but they also served other functions. Members collected monies to provide decent burials for poorer Chicanos; meetings were held to discuss ways of dealing with abusive police or politicians; and the societies served as a training ground for future leaders.

The "mutualista" tradition found a more sophisticated expression in La Orden de Hijos de America, which was founded in San Antonio in 1921 to fight for the advancement of Mexican Americans. Their councils served as predecessors to the League of United Latin American Citizens (LULAC), which was established in 1928. LULAC was founded in Texas, where racism against Chicanos has always been most blatant; but LULAC councils fought discrimination in other states as well. They established pre-schools to teach Chicanos English, gathered scholarship funds through community lotteries, and LULAC councils did what they could to protest killings, segregation, and other abuses.

In 1930, Anglo attorneys, along with Mexican American lawyers active in LULAC, attempted to test the civil rights of Chicanos in a court of law. They filed suit in Texas to protest school segregation. The case won at trial but lost on appeal. The court held that school boards could reasonably place Chicano and white elementary school children in totally separate schools.

Post-War Awareness

World War II was a major turning point. Chicanos were drafted into the Armed Forces in large numbers. Mexican Americans, in fact, became the country's most decorated ethnic group during World War II.

The war gave many Chicanos their first exposure to life outside the barrio. The G.I. Bill of Rights also allowed some Chicano veterans to buy homes and gain access to education. Perhaps the most significant aspect of the war was the fact that Mexican Americans laid down their lives by the thousands for the preservation of the United States; yet the country that accepted that sacrifice still failed to acknowledge the equal standing of Chicano people.

Mexican Americans who were hailed as Yankee liberators in Paris returned home to find employment notices which read, "Help Wanted, Anglo. No Mexicans." Separate bathrooms bore the label "Hombres Aqui." Restaurant signposts announced, "No Mexicans served." Public swimming pools were still closed to Chicanos. Mexican Americans were still being beaten to death by police.

Chicanos organized to fight discrimination surrounding them. The refusal of the Texas white establishment to bury Felix Longoria, a Chicano war hero, in a military cemetary at Three Rivers, Texas, served as a catalyst for Dr. Hector Garcia's formation of the American G.I. Forum in 1948. The organization began working for social reforms. LULAC also stepped up its activities, and other, more politically-oriented groups developed.

These new efforts were countered by strong forces. In the early 50's, with returning Anglo veterans needing work, Chicanos were again seen as draining jobs, and "Operation Wetback" rounded up and deported 3.8 million Mexican-origin laborers, including many citizens and legal residents. Pressures of the McCarthy era caused Chicano civil rights efforts in general to be checked by the threat of a "communist" label.

Abigail Heyman

Use of the Courts

The post-war period witnessed the first effective use of the courts as a means of gaining equality for Chicanos. In the late Forties, Carlos Cadena, a Mexican American attorney in San Antonio, Texas, won a lawsuit which stopped use of "restricted covenants" that had prevented lands in Anglo neighborhoods from being sold to Mexicans or blacks.

Cadena and Gus Garcia, another Chicano attorney, also worked with Al Wirin, a Los Angeles lawyer, on a case protesting segregation in Texas schools. The suit did not actually gain integration, but it did at least cause state authorities to repudiate segregation on an official level. Wirin had sought integration a year earlier in California; Ralph Estrada would later attempt to integrate Arizona schools, and suits in Texas and California began attacking Chicano exclusion from public pools.

The crucial case, however, was *Hernandez v. Texas*, a case argued before the U.S. Supreme Court in 1954 by Cadena and Garcia. Pete Hernandez, the defendant, had been tried and convicted for murder in Jackson County, an area which was 14% Chicano. His jury panel had not included one Hispanic person. In fact, no Spanish-surnamed person had served on any jury of any sort in Jackson County during the past 25 years.

Hernandez was the first Mexican-American discrimination case to reach the nation's high court, and it was the first U.S. Supreme Court suit to be argued by Mexican American attorneys. It was also a victory.

Chief Justice Warren held that ". . . the state court had erred in limiting the scope of the equal protection clause to the white and Negro classes; . . . (and) that persons of Mexican descent were a distinct class . . ." entitled to the protection of the 14th Amendment. The legal implications of the *Hernandez* decision were profound. The nation's highest court had finally acknowledged that Chicanos were not being treated as "whites" in the Southwest as many Anglos had claimed. Mexican Americans were recognized as a separate class of people who were suffering profound discrimination. The decision paved the way for class-action legal work that could broadly attack the ills of the Chicano community.

The Sixties

By the time the 1960's came along, 85% of the Mexican Americans in the nation were native born. They could no longer be legally deported, and they were tired of being ignored. The revolution in black consciousness and civil rights was teaching Mexican Americans some valuable lessons. They were ready to stage a major battle to gain the rights they were due as citizens:

1963: Cesar Chavez, an Arizona-born farmworker, started knocking on doors in Delano, California, to organize farm laborers.

1963: Reies Lopez Tijerina founded La Alianza Federal de Mercedes to demand that the lands of northern New Mexico be returned to the Mexican American people.

1966: An Equal Employment Opportunity Commission meeting was held in Albuquerque, New Mexico, to investigate Mexican American problems. About 50 participants walked out to protest the fact that the EEOC did not have one Mexican American person on the staff.

1967: *El Grito, a Journal of Contemporary Mexican American Thought* began publication in Berkeley, California. Chicano poetry, creative writing, and scholarly essays on Mexican-American themes were published.

1967: Jose Angel Gutierrez founded the Mexican American Youth Organization in San Antonio, Texas. This union of Chicano students, through a series of transformations, became La Raza Unida Party, the first Chicano political party.

1967: Articles of Incorporation were filed in San Antonio, Texas, for the Mexican American Legal Defense and Educational Fund, the first national Chicano civil rights legal organization.

1968: At Wilson High School in East Los Angeles, the principal cancelled a production of "Barefoot in the Park" that Chicano students had worked on for months, declaring it unfit. The pupils at Wilson walked out. Within 72 hours, 5,000 students from Garfield, Roosevelt and Lincoln High Schools and a number of junior high schools also walked out. Wholesale arrests and beatings of students followed.

1969: Corky Gonzales, a former boxer, poverty program director, and founder of the Crusade for Justice, worked to establish La Raza Unida Party in Colorado.

1969: The first Chicano anti-war rally in the United States was organized in Los Angeles. Two thousand marchers protested the fact that Mexican Americans were being killed at a 2-to-1 ratio to whites in Indochina.

1969: Catolicos Por La Raza staged a rally before the new $4 million St. Basil's Cathedral in L.A. demanding that the church provide programs for Chicanos. As they found their way into the Cathedral, they were attacked by undercover deputies in the guise of ushers, who brandished nightsticks. The congregation sang, "O, Come All Ye Faithful" as demonstrators were kicked, clubbed, and maced by police.

It was into this atmosphere of fierce anger and equally fierce pride that the Mexican American Legal Defense and Educational Fund was born.

September 25, 1987

The Honorable Joseph Biden
U.S. Senate
Washington, D.C. 20510

Dear Senator Biden,

As you prepare to vote on the n t H. Bork, we ask that you consider the conce lition of 372,000 To Stop Bork. This gra posed of 30 organizations representing the state. It is unique in its total lack of str ficers. There is no treasury. There is no st... Each organization has contributed according to its own resources.

Much has been done to educate Minnesotans as well as our elected representatives in the U.S. Senate on the threat of this nomination to our liberties. Over 100,000 postcards have been distributed throughout the state to be sent to Senators Durenberger and Boschwitz. We feel sure they have been arriving in constant large numbers.

At a press conference on August 11 our coalition numbered 15 organizations, representing 137,000 people. On September 14, we held our own hearing on on the Bork nomination. Representatives from 27 groups with a combined membership of 224,000 Minnesotans presented testimony defining our varied concerns (see enclosed).

Today we are 372,000 from 30 organizations. We have received national and state media attention and have recently formed a speakers bureau to answer the demand of other groups in the state for information on Judge Bork. This outpouring of support for our efforts to stop Bork is unprecedented in Minnesota as I am sure it would be in your own state.

This energy and committment is even more extraordinary since, from the beginning, it has been generally understood that our Senators would vote to confirm Judge Bork no matter what we do.

In closing, let me emphasize that no one issue has motivated us and no one's issue is more important than another to us. The totality of our concerns is greater than the sum of the parts. We urge you to consider our testimony when you vote.

Sincerely,

The Reverend Lee B. Wiskocil
Minnesota Coalition of 372,000 To Stop Bork

MINNESOTA ORGANIZATIONS PARTICIPATING IN THE COALITION OF 372,000 TO STOP BORK

September 25, 1987

Common Cause
DFL Central Committee
Minnesota Education Association
Minnesota Federation of Teachers
American Federation of State, County,
and Municipal Employees, Minnesota Chapter
National Association For The Advancement Of Colored People
Minneapolis Urban League
American Association Of University Women, Minnesota Chapter
Children's Defense Fund
Minnesota Disability Coalition Against Bork
Minnesota Federation Of Business and Professional Women
Minnesota Women's Political Caucus
Minnesota N.O.W.
Twin Cities N.O.W.
Planned Parenthood of Minnesota
National Council of Jewish Women
People For The American Way, Minnesota Chapter
National Lawyers Guild
Abortion Rights Council of Minnesota
GOP Feminist Caucus
DFL Feminist Caucus
Women's International League For Peace and Freedom
Women Against Military Madness
Minneapolis Y.W.C.A.
Hennepin County Women's Political Caucus
Ramsey County Women's Political Caucus
Minnesota Association of Retarded Citizens
American Jewish Congress
Minnesota Public Interest Research Group
Women's Caucus of the Progressive Student's Union (U.M.)
Minnesota Rainbow Coalition

American Association of University Women

2401 Virginia Avenue, NW, Washington, DC 20037
(202) 785-7700

FIVE REASONS AAUW OPPOSES
THE NOMINATION OF ROBERT H. BORK
TO THE U.S. SUPREME COURT

The American Association of University Women, a national organization of 150,000 college graduates in every state, opposes the nomination of Judge Robert H. Bork. His extensive Constitutional opinions show a disposition against protections for individual citizens. AAUW believes that Judge Bork must not hold the deciding vote on the Supreme Court for five reasons:

1. INDIVIDUAL LIBERTIES: Bork's appointment would jeopardize a continuing Supreme Court role in civil rights progress. His legal actions have opposed fair housing, school desegregation and affirmative action remedies. He objected to rulings which banned poll taxes and voter tests for literacy.

2. EQUAL PROTECTION: Bork states that Congress can enforce only those rights explicitly declared in the Constitution. He has challenged Court assertions of rights under the Fourteenth Amendment's equal protection clause for prisoners, illegitimate children, and non-custodial parents. In the absence of an Equal Rights Amendment (which Bork also opposes), legal rights for American women depend largely upon Congressional action and the Court's interpretation of the Fourteenth Amendment.

3. RIGHT TO PRIVACY: Bork rejects the principle of a Constitutional right to privacy and would permit government to intrude into the private lives of Americans. He condemned as "unprincipled" and "specious" the Court's declaration that private use of contraceptives must be legal. He called the decision on reproductive choice "unconstitutional." AAUW believes the right of private individual choices must be guaranteed.

4. ACCESS TO THE COURTS: AAUW supports an individual's fundamental right to seek judicial redress. A 1986 law review survey found that Bork denied access to individual plaintiffs in 10 out of 11 cases involving Constitutional questions. When recourse to the courts is restricted, all Americans are vulnerable.

5. JUDICIAL BALANCE: This appointment will establish either ideology or balance on the U.S. Supreme Court. Last year's Rehnquist and Scalia confirmations ensured a strong conservative viewpoint. Replacement of the centrist Powell by an ideological activist would provide the swing vote to reverse progress and precedent in civil rights. AAUW believes the Senate must protect Supreme Court balance by defeating the Bork nomination.

(over)

WAM

Women Against Military Madness
3255 Hennepin Avenue South, Minneapolis, MN 55408 (612) 827-5364

When I reflect on all the members of Women Against Military Madness and other peace and justice organizations who practice democracy, that is the right to protest, to assemble, to free speech, I am reassured that voices of dissent can be heard. I am reassured that citizens of the United States have a say in the workings of our government beyond only their right to vote.

It no longer comes as a surprise when some citizens criticize the right to dissent since the political climate under our present administration attempts to silence these rights and thus gives permission for others to do so. Our president has set the tone for any person to become a Rambo. The recent running over of Vietnam veteran Brian Willson while protesting the train carrying weapons bound for Central America in California is an example of this brutal silencing; it was not only the act of the engineer.

With the confirmation of Robert Bork, we fear we will be explicitly silenced--the sound of facism.

With the confirmation of Robert Bork, we fear that the privacy of citizens who work for justice will be violated; break-ins of organizations involved in sanctuary work, in native american work have regularly occurred. There are camps around the country already set up for the incarceration of protestors--the sound of facism.

With the confirmation of Robert Bork we fear that the Iran-Contragate scandal will be one of many illegal acts of the executive branch of our government sanctioned by the court, thus silencing our Congress and eliminating the potential for world-wide justice.

Acts of war and agression will flourish with decisions being made by those few individuals--inside and outside the executive office--the sound of facism.

If we want a thriving democracy, then Robert Bork must not be confirmed. If we want a democracy that works for the people--all people--then Robert Bork must not be confirmed.

Nikki LaSorella
Co-director

September 14, 1987

Polly Mann For U.S. Senate

529 So. Cleveland #5
St. Paul, Minnesota 55116
(612) 698-3474

Statement for Minnesota Coalition to Stop Bork

I am Polly Mann and as I may run for the Senate of the United States I consider it important to express my views on the nomination of Judge Robert E. Bork. I am concerned because his confirmation would have a very negative impact.

Individual liberties would be eroded, especially in fair housing, civil rights, school desegregation and affirmative action rulings.

Equal protection under the law would no longer be assured for prisoners, children, non-custodial parents and women.

Bork would deny the constitutional right to privacy in sexual practices, abortion and the use of contraceptives.

While these results in themselves are dangerous, the overriding concern should be given to his history as a doctrinaire, intent on interpreting the law according to an ideology so radically at odds with the Constitution as to amount to a "Bork Rule of Law."

According to him, to be a "principled" judge means to have and to apply one's own theory of law. And in his view the Court's power is legitimate only if it has a valid theory to define the limits of the respective spheres of majority and minority freedom and to apply such limits in reaching its decision.

The problem with this ideology is that the Constitution authorizes the Supreme Court to consider only specific cases which precludes it from proclaiming theory in advance of any set of facts. This is how constitutional adjudication works. The law is discovered in the cases and not vice versa. Judge Bork could be compared to a scientist who sets up an experiment to produce a predetermined outcome.

He has made it clear how he would decide major constitutional cases so the Senate, in reality, is being asked not to confirm a man but to establish on the Court a doctrine and a set of concrete decisions, most of which are reversals of established law and precedent.

The Constitution is complicated, difficult to understand and apply. This has been part of its continuing vitality. But 200 years of decisions by the Court have underscored the intention of the framers to make it very difficult to take away any of those specified individual rights.

In recent time no American institution has served us better than the federal courts. For years Bork has staked his career on repudiating and denouncing their decisions. For the United States Senate to confirm this appointment would be the repudiation of 25 years of Supreme Court decisions protecting individual rights and liberties.

Polly Mann

September 14, 1987

ne Disability Coalition Opposed to Bork has grave concerns for the uture of civil rights for people with disabilities if the Senate onfirms the nomination of Judge Bork to the Supreme Court. His onservative interpretation of Section 504 of the 1973 Rehabilitation ct (civil rights legislation for people with disabilities that equires all services receiving federal funds to provide full access) ould deny millions of disabled Americans equal access to commerical irlines as evidenced by his opinion in the case of the Paralyzed eterans of America vs. the U.S. Department of Transportation.

is opinion in this case gave commercial airlines the ability to iscriminate against disabled passengers even though the airlines were ependent on airports which receive heavy federal subsidies.

avid Savage of the L.A. Times quoted Judge Bork regarding this andmark case. Bork used several nonsensical comparisons that isplayed his ignorance of the real issue of equal access by disabled eople. He said the idea had great potential, truckers could be overed under the law because they use the federally funded highways nd lawyers could be covered because they depend on the federal ourts.

hese remarks make a mockery of the intent of the Congress to uarantee disabled citizens full access to society. Millions of isabled Americans have achieved access to employment and education hrough this legislation over the past decade. The Coalition fears hat Bork will attempt to reverse this progress and undermine our chievements. His attitude mocks the right of disabled Americans to ive in a society that guarantees full and equal access to all of its itizens.

or further information please contact Carolyn Emerson at 612-729-7402 r 612-646-0929.

Planned
Parenthood of Minnesota
1965 Ford Parkway
Saint Paul, Minnesota 55116-1996
Telephone 612 698-2401

Today, Planned Parenthood of Minnesota joins with other members of this coalition to urge Senators Durenberger and Boschwitz to listen carefully and thoughtfully to the wide range of concerns raised about the nomination of Robert H. Bork to serve as an Associate Justice of the U.S. Supreme Court.

Planned Parenthood has worked throughout its history to assure that reproductive health care was available to women of childbearing age no matter what their social or economic status. Over the years, great strides have been made to assure the right of individuals to decide whether or not to conceive or bear children. We now find these strides at risk of being erased.

One of the most basic rights which we as Americans share is the right to privacy, the right for an individual to make certain decisions about one's private life and realtionships without government intrusion. One of the most private decisions which we as individuals can make is the decision to conceive or bear children. This right to privacy might not be explicitly stated in the Constitution but it is certainly a principle which underlies the rights, freedoms and privileges which are written there. Through his writings and judicial decisions however, Judge Bork has made it clear that he does not believe that the Constitution protects an individual's right to make certain fundamental personal decisions according to one's own conscience. He seemingly thinks it permissible for the government to intrude on the most private aspects of the lives of the American people including

their decisions concerning whether or not to conceive or bear children.

In testimony before a Senate Judiciary subcommittee in 1981, Judge Bork flatly called Roe v. Wade, the landmark decision striking down state laws prohibiting abortion, "unconstitutional." Further, he has stated that Roe v. Wade was "by no means the only example of such unconstitutional behavior by the Supreme Court." Judge Bork's views go far beyond their implications for abortion rights to include even the use of contraceptives to prevent pregnancy. He has also rejected a 1965 Supreme Court decision which struck down a Connecticut law banning the use of contraceptives, even by married people in their own homes. Regarding this case, Griswold v. Connecticut, Judge Bork made the following statement in 1985:

> "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision. The majority opinion merely notes that there are a lot of guarantees in the Constitution which could be viewed as guarantees of aspects of privacy...of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies."

But Judge Bork's problems with an individual's right to privacy in matters of one's reproductive life do not end with the private use of contraceptives to prevent pregnancy. In another case, he found that it was permissible for a corporation to make sterilization a condition of employment. In 1981, Judge Bork ruled in favor of American Cyanid's "fetus protection policy" in a suit brought by the Oil, Chemical & Atomic Workers on behalf of 5 women who were required to be sterilized in order to obtain employment at American Cyanid. So Judge Bork who on the one hand thinks it is legitimate for the States to be interested in whether or not a couple should be allowed to gratify their sexual desires without fear of pregnancy, one the other hand

would allow a corporation to require a woman to give up the option of childbearing as a condition of employment.

These unwarranted intrusions into the personal lives of American citizens are of grave concern to Planned Parenthood and many others. If our reproductive lives are open to such cavalier statements and judgements as those made by Judge Bork then we are no longer a free people. If the government or a corporation has the right to enter our bedrooms and dictate to us whether or not we are allowed to conceive or bear children then we no longer have any privacy when it comes to making decisions concerning our private lives and relationships.

Planned Parenthood of Minnesota calls upon Senators Durenberger and Boschwitz, as representatives of the private citizens of Minnesota, to reject the nomination of Robert H. Bork and so protect the right to privacy we all share in matters of human reproduction and personal relationships.

MINNESOTA EDUCATION ASSOCIATION
Forty-One Sherburne Avenue
St. Paul, Minnesota 55103
612-227-9541
A POWERFUL FORCE FOR BETTER EDUCATION

COALITION OF 218,000 TO STOP BORK

Testimony of Judy Schaubach
Secretary-Treasurer of the Minnesota Education Association
September 14, 1987
Minnesota State Capitol

On July 1, 1987, President Reagan nominated U.S. Court of Appeals Judge Robert H. Bork to the U. S. Supreme Court. Three days later, the 1987 NEA Representative Assembly voted overwhelmingly to oppose the nomination. The Minnesota Education Association is an active participant in the Coalition to Stop Bork. We are also deeply involved in informing our 40,000 members of Bork's positions and encouraging them to take whatever action is necessary to stop his confirmation.

Bork has both publically and privately expressed views in opposition to NEA/MEA policy on a wide range of issues. It is important to underscore the words - wide range of issues - because indeed this is not a single issue fight, evidenced by the diverse groups which comprise this coalition.

In one critic's words, Bork is "a walking constitutional amendment" - a means by which the Reagan administration will be able to achieve the radical social agenda that the Supreme Court and Congress have, to date, rejected.

President
Vice President
Secretary-Treasurer
Executive Director

Robert E. Astrup, Hounds View
Walter H. Munsterman, Anoka
Judy L. Schaubach, Red Wing
Larry E. Wicks, St. Paul

Bork's rulings as a U. S. Court of Appeals judge and his extensive writings on constitutional theory reveal that he is strongly opposed to the rights of employees. He has repeatedly ruled against both private and public employees who challenged terminations, layoffs, demotions and other adverse employment actions. His ruling on the Oil, Chemical and Atomic Workers v. American Cyanamid Company case is evidence of his extremist support of an employer's rights.

In articles, court decisions, congressional testimony and speeches, Bork has expressed opinions on issues which deeply concern us, including:

FREEDOM OF SPEECH - Bork has argued that "constitutional protection should be accorded only to speech that is explicitly political." This view is of particular concern to teachers because it threatens both the right of academic freedom and the right to speak on matters of public concern outside the classroom.

INTEGRATION AND RACIAL DISCRIMINATION - In 1972, Bork was one of only two law professors to testify in support of the constituionality of legislation drastically curtailing critical school desegregation remedies. In addition, Bork has attacked the Supreme Court decisions outlawing racially restrictive covenants in deeds and defended the constitutionality of the poll tax,

formerly used in some states to prevent Blacks from voting. Initially, Bork opposed provisions of the 1964 Civil Rights Act that outlawed racial discrimination by businesses that provide services to the public, because, in his view, the legislation "would force one man to associate with another" contrary to a citizen's "personal preference.

SCHOOL PRAYER AND STATE AID - Bork holds a very limited view of the First Amendment guarantees of separation of church and state. His attitude is revealed in a first person account of Bork's speech given before the Brookings Institute published in the Washington Post:

> Another member of the audience, the Reverend Kenneth Dean, pastor of the First Baptist Church of Rochester, New York, said he told Bork of his experience as a junior high school teacher in Florida, where Bible reading began every school day.
>
> Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the

classroom, he recalled. Dean said he felt he had treated the student badly by singling his out before his peers. Dean quoted Bork as responding, 'So what, I'm sure he got over it.'

As teachers, we are also concerned about Bork's record on such fundamental issues as privacy, rights of the handicapped, sexual harassment, union rights and access to the courts.

As citizens, we are concerned about his past behavior as well as his suggestion that he would be duty bound to correct what he perceives as consititutional errors committed by previous Supreme Courts. He would likely reverse many favorable decisions involving civil rights and individual liberties.

Additionally, his participation in the firing of Watergate Special Prosecutor Archibald Cox raises serious question about his judgement and willingness to endorse government attempts to sidestep the rule of law.

Students of the Constitution, from liberals like Laurence Tribe to conservatives like Philip Kurlan, have made it clear that Senators may appropriately consider judicial philosophy or ideology in deciding

whether to confirm a judicial nominee. The history of the nation is replete with such decision-making by Senators, fromthe rejection of George Washington's nominee of John Rutledge for his opposition to the Jay treaty to Senator Thurmond's successful filibuster of the nomination of Abe Fortas to be Chief Justice.

Senators take the same oath of office as the President and judges--to support and defend the Constitution. A senator would be remiss in his/her obligation if he/she voted to confirm a nominee whose view of the Constitution would alter rights and immunities that are fundamental to our legal system.

We expect that our Senators--Rudy Boschwitz and David Durenberger--will base their decisions on this critical confirmation vote, not on blind loyalty to the President, but on their sworn duties to the citizens of Minnesota and the Constitution of the United States.

As Americans, we are committed to investing our resources in the future. Our commitment to public education, a clean and safe environment, the rights of individuals, a government based on citizen participation, and a lasting peace are evidence of this. It is the concern of the MEA/NEA that the appointment of Bork could dramatically negate these significant investments. It is the obligation of our Senators to look beyond the rhetoric and closely examine the record of Bork in order to make their decision.

mwpc

MINNESOTA WOMEN'S POLITICAL CAUCUS
E West University Avenue St Paul MN 55103 (612) 228 0945

The Minnesota Women's Political Caucus opposes the nomination of Judge Bork for position on the U.S. Supreme Court because:

* Judge Bork believes the equal protection clause of the 14th amendment applies only to race discrimination, and exludes discrimination against other minorities and women. In published decisions, Judge Bork ignores precedents set by the court in 1971, 1972 and 1979, when the court applied the 14th amendment to sex discrimination cases.

Note particularly that Judge Bork believes that the equal protection clause of the 14th amendment applies only to race discrimination, exluding discrimination against other minorities and women. Beginning in 1971, the Supreme Court began gingerly to apply the 14th amendment to sex discrimination cases, e.g. Reed v. Reed, 404 U.S. 71 (1971); Stanley v. Illinois, 405 U.S. 534 (1972); Orr v. Orr, 440 U.S. 286 (1979) and others.

* On a number of civil rights issues Judge Bork has taken a negative view. He states that the one person, one vote principle "runs counter to the text of the 14th amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.

* Judge Bork has criticized as "unprincipled" the court's decision in Griswold v. Connecticut, in which the Court struck down a Connecticut statute making it illegal for married couples to use contraceptives. He said, "I do not think there is a supportable method of constitutional reasoning underlying the Griswold decision."

In that article, he described a landmark 1965 opinion recognizing a right to privacy that entitled married couples to use contraceptives in their home as "shallow, murky and rhetorical" and "one more slogan that some justices will use ... in the process of writing their own tastes into the law."

* Judge Bork testified in 1981 before the Senate Judiciary Committee that the Supreme Court's decision in Roe v. Wade is "an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."

* Although Judge Bork normally believes that the courts should defer to the experience of administrative agencies, he takes an activist role when the rights of businesses are at stake. He ruled against the Occupational Safety and Health Administration and used legislative history, rather than the plain language of the statute, in rejecting a challenge to a company's policy requiring women of childbearing age either be sterlized or be fired.

STATEMENT OF THE MINNEAPOLIS Y.W.C.A.

My name is Andrea Rubenstein, and I am a member of the Board of Directors of the Minneapolis Y.W.C.A. and the co-chair of the Social Action Committee. Our Board, representing approximately 12,000 members and acting on those policies concerning social action that have always been supported by our members, unanimously voted to join the Minnesota Chapter of the National Coalition to Stop Bork because we strongly believe that the proposed nomination of Judge Robert Bork to the United States Supreme Court is the antithesis of all we as an agency and as individuals have been working for in our efforts to fight racism, sexism, and other "isms" and to promote actively the rights of women and minorities.

I have no doubt that others have raised concerns about the assault on family privacy and particularly a woman's right to self-determination that can be expected to result should Judge Bork be seated. We echo those concerns.

We are also particularly frightened, dismayed and appalled by Judge Bork's record on civil rights. A review of his record as a judge and legal commentator shows him not merely to be a strict constructionist of the Constitution, simply a member of the school of judicial thought that believes the Constitution must be interpreted to mean exactly what it says, literally, and no more. On the contrary, he seems more likely to be an idealogue who may use that doctrine of strict construction as a means to promote political ends. Thus, he has interpreted very narrowly those portions of the Constitution which provide protection of individual rights, such as the Fourteenth Amendment, but he takes a very broad view of the powers and discretion of the Executive Branch of the federal government, also derived from that same document. We shudder to think of the impact on issues such as safety in the work place, privacy rights of welfare recipients, immigrants, and the like.

We are also concerned about the balance of the U.S. Supreme Court, not in terms of numbers: liberals versus conservatives, because we cannot expect to defeat Bork on that issue, alone.

We are, rather, concerned about "balance" in terms of the kind of dialogue we have a right to expect not only from the high court, but from any court. I am a lawyer, and when I appear in court, I cannot expect a judge necessarily to agree with my political views, but I should expect and do expect a judge to approach my case with an open mind, to hear both sides, and to decide fairly based on precedent to some extent and on the merits of that individual case. I envision the Supreme Court as it was presumably structured, as a panel of individuals who engage in full and fair discussion of the issues of the cases before making a reasoned decision. While this vision may be somewhat naive or unrealistic, Judge Bork has indicated that his approach is far too greatly removed from this structure to be tolerated. He has indicated disdain and impatience with those Justices whose views he does not share; he has indicated he has prejudged many cases and will use them as an opportunity to overrule those opinions he does not like.

Are these the credentials of Supreme Court Justice? We think not and so adamantly oppose the nomination of Judge Robert Bork to the United States Supreme Court. Moreover, we ask you, our Senators, to exercize good judgment and oppose it as well.

TWIN CITIES NOW

NATIONAL ORGANIZATION FOR WOMEN
P. O. BOX 9629
MINNEAPOLIS, MN 55458
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FOR IMMEDIATE RELEASE:
September 14, 1987

PRESS CONTACT: Ms. Dixie Riley , President
(612) 424-4308, 348-5743 w

TWIN CITIES NOW DECLARES AN EMERGENCY TO "SAVE THE COURT" BY OPPOSING THE BORK NOMINATION

On the eve of the Bicentennial celebration of the U. S. Constitution, Twin Cities NOW declares an EMERGENCY to "SAVE THE COURT" by opposing the Bork nomination.

The Twin Cities National Organization for Women will fight the confirmation of Judge Robert H. Bork because Bork, if given the chance, would redefine the world by re-intrepreting the Constitution based not on the precedence of the last 200 years but on the concept of Original Intent. Based on his writings and case histories: Bork would eliminate the Rights of Privacy, the concept of "One person, one vote," and eliminate remedies for Discrimination. Bork would limit Freedoms of Speech, and the Equal Protection Under the Law provisions; and diminish the separation of Church and State by expanding prayer in schools. Bork would deny equality and civil rights to women, minorities, and protected groups; and finally overturn anti-trust laws and provide corporate interests at the expense of the public interest of individuals and minorities.

THE WORLD ACCORDING TO BORK eliminates the individual's Right to Privacy by outlawing the use of contraceptives, prevent families the rights to choose the size and spacing of their families, outlaw a woman's right to choose and have total control over her own body, and put the government into the bedroom of consenting adults.

THE WORLD ACCORDING TO BORK opposes equal rights for women and limits women's access to only the vote, opposes the Equal Rights Amendment, eliminates the protection of women against Discrimination and in particular Sexual Harassment at work, and eliminates Affirmative Action.

THE WORLD ACCORDING TO BORK opposed the Civil Rights Act for 9 years and opposed public accomodations for all people , opposed school desegregation, opposed fair housing remedies for low income black citizens. eliminates the one person, one vote concept, and

disagreed with the Voting Rights Act when the literacy tests and poll taxes requirements were eliminated.

THE WORLD ACCORDING TO BORK when using the philosophy of Original Intent of the framers of the Constitution more narrowly defines the 14th Amendment of Equal Protection under the Law to exclude women, and minorities because the authors of the Constitution deliberately excluded women from the Constitution, excluded the American Indians, and counted blacks as 3/5 of a person back then.

WE OPPOSE THIS VIEW OF THE WORLD AND OUR CONSTITUTION ACCORDING TO BORK, and would invite Senators Durenburger and Boschwitz to say NO to the BORK nomination. The very foundations of our Constitution if it is to survive another 200 years is to keep progressing for the advancement of our democracy and not by going backwards as Judge Bork would desire. Thank you.

Ms. Dixie Riley
President

Minnesota NOW

Griggs-Midway Bldg. Room S-335
1821 University Av
St Paul MN 55104
612-642-1384

The Constitution is the product of a handful of educated white men who represented the conventional wisdom of their period and viewed women and black men as property. It took a civil war and three Constitutional amendments to change the status of black men from property to full citizenship. Women have not yet achieved full equal status under the law.

To rectify inequities not addressed by the framers, many minority groups - disabled citizens, women, aliens, and others - have pursuaded their legislators to change state and federal laws. They have also sought protection under the 'equal protection' clause of the fourteenth amendment. Nominee Bork disapproves of such suits - particularly class action suits as a remedy for inequity. Judge Bork also expressly stated that he supports the rights of the 'majority' (Griswold vs Connecticut). He therefore contradicts himself when he denies women constitutional protection under the fourteenth amendment since they are the numerical majority in the United States.

Contradiction is one of the characteristics of the legal opinions of nominee Bork. While he says he would have supported the Court's ruling in Brown vs the Board of Education, he also supported keeping the poll tax and opposed the court's 'one man, one vote' ruling.

Judge Bork also supports the rights of Executive privilege as opposed to the other brances of government. He supported Nixon's acts in the Saturday Night Massacre and opposed Congressional passage of the War Powers act. It is appropriate that Bork is the nominee of an administration so recently exposed for its misuse of executive power.

Finally, while nominee Bork supposedly supports the rights of the majority, he has consistently supported the rights of the powerful minority of business interests. His opinions on matters of anti-trust legislation reflect the sentiments of former cabinet appointee Charles Wilson - ' what's good for General Motors is good for America'.

This administration has attempted to portray Judge Bork as a moderate and fair-minded justice. We say Judge Bork represents an arrogant and right-wing minority of opinion that wishes to return to an era when blacks and women knew their place (on their knees). We want a judge who is fair-minded and will consider the rights of all the people of America. Judge Bork is not that man - justice yes, Bork no!

the poor as well as the privileged.

Minnesota National Organization for Women

THE POSITION OF THE MINNESOTA RAINBOW COALITION CONCERNING JUDGE BORK'S NOMINATION TO THE U.S. SUPREME COURT

The Minnesota Rainbow Coalition is aware of Judge Bork's dismal record on civil rights and on the rights of the poor and powerless. We are also aware that Judge Bork claims to be fair and impartial. Perhaps the best response is an old Southern proverb: 'It ain't what you say - it's what you do'.

And exactly what did Judge Bork do?

He disagreed with the equal accommodations section of the Civil Rights Act; he disagreed with the principle of one person - one vote; he favored a poll tax; he criticized a ban on literacy tests that were used to keep minorities from voting; he ruled against the underdog in virtually every controversial case that came before him; etc., etc. He claims a philosophy of judicial restraint, but that just isn't true. He claims a constant righteousness during the Saturday Night Massacre, but - according to many observers - that just isn't true.

Consequently, the Rainbow Coalition has developed these opinions about Robert Bork:

1. He could care less about minority rights.

2. He's an embarrassment to the American tradition of justice for all.

3. (And this is important. Considering that a Supreme Court Justice embodies the highest ideals of our country, then this is extremely important.)

We don't trust him.

Mike Bright

As Chair of the Minnesota Young DFL
I come here today
to speak to the conscience and sensibilities
of Minnesota's young people,
For it is we,
the young people of this state
and this nation
that will reap the barren harvest
of this misguided appointment.
Why must we, the young and ambitious,
the idealistic and sincere
inherit a clouded future
from the last-minute effort of
~~as the last, fitful spasm~~
a failed
~~of an impotent~~ and out of touch administration.
Why must we gird ourselves for battle today
and take the field against a foe
defeated years ago.
That foe is ignorance,
it is opression,
and the cold hand of arbitrary authority.
For the record of judge Bork is clear.
His anti-trust and civil rights positions
Favor the institution over the individual.
His rulings on social and political issues

Have denied the right of privacy,
self determination, and expression.
Seated for life
on the U.S. Supreme Court
Robert Bork represents a threat
to the gleaming monuments of liberty and justice
so carefully wroght by our founding fathers.
Seated for life
Like some dusty relic on a shelf--
--a symbol of what is past,
of backwards thinking,
of retrenchment.
Seated for life,
as a constant painful reminder
that old ideas die hard
and that along the way to their demise
they must forever consume the energy and vigor
of the youthful and forward thinking
who are called upon
To put them to rest.
It is the right of every generation
to chart a course unique to themselves
Unfettered by dogma and doctrine.
I am here today
To appeal to the youthful optimist
in every Minnesotan

Who truly believes that we have made progress. Let us not allow an activist, who through such cases as Griswold v. Conneticyt, Vincent V. Taylor, and Ollman v. Evans, has shown hiself to also be an extrimist to TURN BACK THE CLOCK.

Let us not allow the instriment of the Satuday Night Massacher the chance for a lifetime of massacres on the civil and human rights of each induvidual.

A RESOLUTION

WHEREAS: The most important vote the U.S. Senate may make in this century is the confirmation of Robert Bork to a seat on the Supreme Court, and

WHEREAS: Robert Bork's record clearly indicates he is opposed to Affirmative Action; "one person, one vote"; the right to privacy; disabled accessibility; antitrust legislation; the classification of sexual harassment as discriminatory; and equal protection under the law for all citizens, and

WHEREAS: Robert Bork's record clearly indicates he is in support of prayer in schools; limiting freedom of speech to the explicitly political; literacy tests as a requirement to vote; parochial aid; the right of restaurants and other public facilities to discriminate against persons on the basis of race; a state's right to ban the sale of contraceptives to married couples, and

WHEREAS: These positions of Robert Bork are contrary to the majority opinion of the American people, and

WHEREAS: Robert Bork, if allowed by the Senate to become a Supreme Court Justice would become the swing vote in favor of all of these minority positions which would change the course of American life for decades to come,

THEREFORE BE IT RESOLVED that the Minnesota DFL urge Senators Boschwitz and Durenberger, with a commitment to basic civil and human rights of all Minnesotans--regardless of political affiliation--to vote NO on the confirmation of Robert Bork to the U.S. Supreme Court.

--adopted by the Minnesota Democratic Farmer Labor Party State Central Committee, August 1 , 1987.

AN AFFILIATE OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE

ABORTION RIGHTS COUNCIL OF MINNESOTA

3255 HENNEPIN AVENUE • SUITE 227 • MINNEAPOLIS, MINNESOTA 55408 • (612) 827-5827

Statement presented at Coalition hearing September 14, 1987
by Rosalie Goldstein, Vice-President, Abortion Rights Council

"I am Rosalie Goldstein, Vice-President of the Abortion Rights Council of Minnesota. We have joined with the Minnesota Coalition and our national affiliate, the National Abortion Rights Action League, in opposition to the nomination of Robert Bork to the United States Supreme Court.

We take this position because the stakes are so great. If Bork is confirmed we will face a radically different way of life in this country--a life without the guarantees of privacy, equality and freedom of expression. Thomas Jefferson wrote "the earth belongs always to the living generation." In 1987, Robert Bork adheres to the doctrine of original intent in interpreting the Constitution.

And where does he stand on the issues --

On privacy. . . Bork rejects the principle of a constitutional right to privacy and would permit government to intrude on fundamentally private and intimate aspects of our lives.

On contraception. . . Bork has spoken out against the 1965 Griswold v. Connecticut decision in which the Supreme Court invalidated a law banning the use of contraceptives even by married couples.

On abortion . . . Bork would tip the balance of the Court against the landmark 1973 Roe v. Wade decision which affirmed a woman's constitutional right to choose legal abortion. Bork would permit states to enact intrusive regulations which would coerce women's decisions about abortion.

On sexual orientation . . . In his best known case on privacy rights, Bork not only ridiculed the gay plantiff's claims to privacy and equal protection, he launched a general attack on the right to privacy doctrine.

Bork has opposed the Supreme Court's fair housing remedies for

President . . . Vice President . . . Secretary . . . Treasurer . . . Executive Director . . .

low income black citizens even though the federal government had participated in the discrimination. He has also criticized affirmative action remedies for employment discrimination.

On sex discrimination . . . In a unanimous decision, the Supreme Court recently held that sexual harassment in the workplace is sex-based discrimination. Bork disagreed with this decision, explaining that it is too hard to know when women welcome male sexual advances and when they do not. He has also written that women, unlike racial minorities, have no constitutional protection against laws that discriminate against them.

In 1984 Bork held that in Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co. that an employer had not violated the Occupational and Safety and Health Act by instituting a policy requiring female employees between the ages of 16 and 50 to be surgically sterilized to hold certain jobs.

Bork also supports the re-introduction of some religion into the public schools.

The Constitution defines the role of the Senate as that of a co-equal in the selection of Justices--the separation of powers check the authority of the Executive branch. One function of the Senate is to prevent the packing of the court whose members serve for live--longer than the term of any President.

Americans expect judges to administer law in the name of justice. The Senate has the obligation to reject the nomination of Robert Bork in the name of justice.

September 14, 1987

Senators Durenberger and Boschwitz:

My name is Rick Scott; I am testifying on behalf of Minnesota AFSCME, the state affiliate of the American Federation of State, County, and Municipal Employees. We submit to you that the U.S. Senate has not only a right but an obligation to consider the judicial philosophy of a Presidential nominee for the Supreme Court. From the very first, Supreme Court appointments have been a joint act of the President and the Senate. Each must be satisfied with all of the qualifications of an individual to merit appointment.

Measured by this standard, Mr. Bork does not deserve your confirming vote. He stands far to the right of the civil and human rights views of the vast majority of Minnesotans - of both political parties.

Mr. Bork is often referred to as a "strict constructionist" on Constitutional issues. Far from being a strict constructionist, on the matter of individual rights he stands the Constitution on end. Bork rejects the concept of an individual right to privacy - - central to many key Supreme Court decisions of our era - - with the oft-quoted remark that "he can find no such right enumerated in the Constitution." But the Constitution says, in the 9th Amendment, that the enumeration of certain rights in that document should not be construed to deny the rights retained by the people. Bork is radically un-Constitutional in rejecting residual rights enjoyed by the American people and should be rejected as a nominee for this reason alone.

On issues relating to the working men and women of our land, we find Bork to be so pro-business and anti-labor that he makes the Reagan administration look like labor's friend! Two cases point up this anti-labor stance of Bork.

The first case is one in which Bork backed the firing of two employees for passing out union sign-up cards to co-workers. He ruled that talking union would "disrupt the workplace - a standard he invented for the case. His decision helped override one of the few pro-worker rulings of the pro-business Reagan N.L.R.B.

The second case is one in which he supported an employers right to require female employees to be sterilized or lose their job. The employer, American Cyanimide, discovered an increase in spontaneous abortions in their work site and rather than clean up the site to create a healthy work environment, they took the short circuit route of requiring employee sterilization. The workers union, O.C.A.W., grieved the case and eventually it wound up in Judge Bork's court. There Bork ruled in favor of the employer over the objections of the Reagan Department of Labor. We consider this ruling not only anti-labor, but anti-life and inhumane as well.

In conclusion, we think Robert Bork is far to the right of our Minnesota political tradition. His nomination should be rejected.

Thank you.

One Justice Away From Injustice

Minnesota Chapter National Coalition To Stop Bork.

One Justice Away From Injustice

Minnesota Chapter National Coalition To Stop Bork.

BPW
minnesota

Minnesota Federation
of Business and
Professional
Women's Clubs, Inc.

SEPTEMBER 14, 1987

THE BUSINESS AND PROFESSIONAL MEMBERS IN THE STATE OF MINNESOTA ASK THAT SENATOR BOSCHWITZ AND SENATOR DURENBERGER TAKE VERY SERIOUSLY THEIR RESPONSIBILITY TO REVIEW THE QUALIFICATIONS OF THIS NOMINEE AND TO CONSIDER THE IMPACT OF HIS PRE-ORDAINED DECISIONS ON THEIR CONSTITUENTS. WE ASK THE SENATORS TO SAFECUARD OUR PROGRESS BY OPPOSING THE NOMINATION OF ROBERT BORK AND ALSO ASK THEM TO ACTIVELY WORK TO CONVINCE THEIR COLLEAGUES TO OPPOSE HIS CONFIRMATION.

THANK YOU.

Ruth M. Shields

RUTH M. SHIELDS
435 S. WARWICK
ST. PAUL, MN. 55105

e Voice of
rking Women

BPW
minnesota

Minnesota Federation
of Business and
Professional
Women's Clubs, Inc.

The Voice of
Working Women

SEPTEMBER 14, 1987

MY NAME IS RUTH SHIELDS. AS PRESIDENT AND REPRESENTATIVE OF THE MINNESOTA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN: AS A WORKING WOMAN: AS A VOTER: AS A TAXPAYER; AND AS AN ACTIVE MEMBER OF MY COMMUNITY OF ST. PAUL, OPPOSE THE NOMINATION OF ROBERT BORK AS ASSOCIATE JUSTICE OF THE U. S. SUPREME COURT.

BPW WAS ORGANIZED IN 1919 AND SINCE THEN THE MEMBERS HAVE WORKED LONG AND HARD TO SEE THAT THE FREEDOMS AND OPPORTUNITIES OF THIS NATION ARE EXTENDED TO ALL ITS CITIZENS - BLACK AND WHITE, MALE AND FEMALE, YOUNG AND OLD. JUDGE BORK'S CONFIRMATION WOULD JEOPARDIZE MUCH OF THE PROGRESS WE HAVE MADE IN THE PAST 30 YEARS TOWARDS MAKING THE AMERICAN DREAM AVAILABLE TO ALL AMERICANS.

JUDGE BORK HAS INDICATED THROUGH HIS DECISIONS, HIS WRITINGS AND HIS PUBLIC STATEMENTS THAT HE IS AN IDEOLOGUE WITH DEEPLY HELD POLITICAL BELIEFS, NOT A DISPASSIONATE JUDGE. HE HOLDS TO A VERY NARROW CONSTRUCTION OF PRIVACY RIGHTS FOR INDIVIDUALS, IS CLEARLY AND VEHEMENTLY OPPOSED TO A WOMAN'S RIGHT TO CHOOSE, AND HAS PUBLICLY STATED HIS NEGATIVE VIEWS ON AFFIRMATIVE ACTION, OPEN HOUSING, EQUALITY OF ACCESS TO PUBLIC ACCOMODATIONS, AND ANTI-TRUST LEGISLATION. THIS IS NOT THE RECORD OF A FAIR-MINDED JUDGE WHO WILL DECIDE ON THE ISSUES OF THE CASE. IT IS THE RECORD OF A PERSON WHO WILL CLEARLY PURSUE A SPECIFIC AGENDA - - AN AGENDA WHICH WOULD SET THE PROGRESS OF WOMEN BACK THREE GENERATIONS.

THE ROLE OF THE SENATE IN THE CONFIRMATION PROCESS IS TO ADVISE AND CONSENT, NOT TO RUBBER-STAMP A NOMINEE DESPITE HIS IDEOLOGY. IT WOULD NOT BE THE FIRST TIME THE SENATE TOOK A STANCE IN OPPOSITION TO A NOMINEE - - ALMOST ONE-FIFTH OF THE NOMINEES TO THE SUPREME COURT HAVE BEEN REJECTED.

SENATOR STROM THURMOND (R-SC) SAID IN 1968: "THE PRESIDENT MERELY PICKS OR CHOOSES OR SELECTS THE INDIVIDUAL FOR A POSITION OF THIS KIND, AND THE SENATE HAS THE RESPONSIBILITY OF PROBING INTO HIS CHARACTER AND INTEGRITY AND INTO HIS PHILOSOPHY, AND DETERMINING WHETHER OR NOT HE IS A PROPERLY QUALIFIED PERSON TO FILL THE POSITION."

John B. Minnick
9126 Glenbrook Road
Fairfax, Virginia 22031
Phone (703) 273-3467

September 22, 1987

The Honorable Joseph R. Biden, Jr., Chairman
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Subject: Nomination and Confirmation of Judge Bork.

Dear Mr. Chairman:

I favor the nomination and confirmation of Circuit Judge Robert H. Bork as an Associate Justice of the Supreme Court of the United States.

The record shows that Judge Bork favors the rule of law and not of men.

The record also shows that the opposition favors the rule of men over the rule of law.

Accordingly, I urge you to reconsider your position and to vote to confirm.

Please include this letter and its attachments in the public record of the confirmation hearing.

One hundred copies are being mailed under separate cover to be placed on the table for the benefit of the news media and others in attendance at the public hearing.

Thank your very much for your courtesy and consideration.

Sincerely,

John B. Minnick

Attachments: Correspondence and related materials favorable to the nomination and confirmation of Judge Bork.

John B. Minnick
9126 Glenbrook Road
Fairfax, Virginia 22031
Phone (703) 273-3487

September 22, 1987

The Honorable Orrin G. Hatch
United States Senator
SR-135 Russell Senate Office Building
Washington, DC 20510

Subject: Confirmation Hearing on Judge Bork's Nomination:
The Rule of Law v. The Rule of Men.

Dear Senator Hatch:

This refers to your letter of August 10, 1987, and supplements my response reprinted on the reverse side of this letter.

What I said about the Iran/Contra and Watergate hearings goes double for the Bork confirmation hearing. If his nomination is confirmed, it will be because he is perceived to favor the rule of law and not of men. If his nomination is not confirmed, it will be because the truth about our government has been covered up again by those who favor the rule of men over the rule of law.

If Judge Bork had known what I know, he might have been able to short circuit the opposition with aplomb. For example, consider the question concerning the "poll tax" amendment. A more appropriate response might have been made along these lines:

> Mr. Chairman, perhaps the gentleman from Massachusetts can tell us when, and under what circumstances his State repealed its poll tax law. As he knows or should have reason to know, the Massachusetts poll tax was a direct tax on the right to vote enforceable by the Sheriff of each local political subdivision. On the other hand, the "poll tax" in Virginia and the other southern states was not a tax on the right to vote, nor was it enforced by Sheriffs or any other public official. It was a capitation tax imposed by Congress as a condition precedent to readmission into the Union. One-half went into the State Literary Fund and the other half went back to the counties for the benefit of public education. It crept into the election laws merely as a matter of collection and not as a means of enforcement. Are there any other questions about the "poll tax" in the South?

Of course there is a great deal more to the overall picture. Although the whole jigsaw puzzle has yet to be seen by the public eye, nevertheless bits and pieces are falling in place and gradually becoming common public knowledge.. In fact, if Judge Bork is confirmed, he may find himself required to take judicial notice of the truth about our government. Accordingly, Congress can no longer afford to cover up the errors of its Acts.

Sincerely,

John B. Minnick

Enclosures: Separation of Powers v. Delegation of Powers: The Iran/Contra Hearings. Officer Review, September, 1987, pp. 12-13.
Report of the Special Committee on Federal Jurisdiction Rules and Procedure, Virginia Bar News, May-June, 1974, pp. 36-41

John B. Minnick
9126 Glenbrook Road
Fairfax, Virginia 22031
Phone (703) 273-3467

August 19, 1987

The Honorable Orrin G. Hatch
United States Senator
SR-135 Russell Senate Office Building
Washington, DC 20510

Subject: Nomination and Confirmation of Judge Bork

Dear Senator Hatch:

Many thanks for your kind letter of August 10, 1987 and especially for the reprints of your addresses concerning the Constitutional debate over the nomination and confirmation of Judge Bork as an Associate Justice of the Supreme Court of the United States.

I favor his nomination and confirmation, but for somewhat different reasons.

We need to develop a new strategy designed to unmask the opposition which favors the rule of men over the rule of law.

I am fully prepared to do this provided you are favorably inclined to call upon me to address the full Senate Committee on the Judiciary in favor of the nomination and confirmation. If so, it may be necessary and advisable to confer with Judge Bork. It would not be fair to him if we were to proceed without his full knowledge and consent.

In the meantime, you may wish to review my work with your counsel. If you have any questions, please do not hesitate to call on me.

Thank you again for your courtesy and consideration.

Sincerely,

John B. Minnick

Enclosures: Copies of letters to the Chairmen of the Select Committees on the Iran/Contra investigations

P. S. There is more to come.

drudgery out of blood counts, blood chemistries, and testing. Newer instruments have been devised: the laparascope that can look into the abdomen through a tiny incision; a similar "scope" to see into joints; the colonoscope which can reach from the rectum to the caecum; the gastroscope to examine the upper gastrointestinal tract; the bronchoscope for visually exploring the lungs.

Then there are the new diagnostic modalities: the CAT Scan (computerized axial tomography); DSA (digital subtraction angiography); PET (positive emission tomography); MRI (magnetic resonance imaging); and finally, SONO (sonography using high frequency sound waves).

In recent years, bypass cardiac surgery has become commonplace. But that is being sidestepped by angioplasty, the use of a balloon to open blocked coronary arteries. Amniocentesis is frequently used to determine the status of the fetus. The pharmaceutical companies have effected great changes in the medicines now being prescribed.

However, with all these great advances, there has been a price to pay. Medical expenses have risen astronomically. Hospitalization coverage is a must. Federal Medicare helps. Medicaid cannot be ignored. Malpractice insurance needs to be resolved. Solo practicing doctors have had to take in associates for better coverage.

What does the future hold? Answers must be sought to many of our economic problems. And there are still diseases to be conquered. AIDS is our most serious threat. Arthritis, birth defects, arteriosclerosis, Alzheimer's Syndrome, and many other conditions are still to be solved. Good health and freedom from debilitating or disabling conditions are the goals in the future for all of us.

U.S. ARMY XIII CORPS annual reunion, 8–11 Oct. 1987, Holiday Inn (International Drive), Orlando, FL. Contact: John Bitting, 10104 Quinby St., Silver Spring, MD 20901. Tel: (301) 593-8919.

315th BOMB WING reunion, San Antonio, TX, 8–10 Oct. 1987. Contact: Col. George Harrington, 4600 Ocean Beach Blvd., #505, Cocoa Beach, FL 32931. Tel: (214) 784-0342.

Separation of Powers v. Delegation of Powers

The Iran/Contra Hearings

by
Captain John B. Minnick,
USMCR (Ret)
Perpetual Member,
Northern Virginia Chapter

Definition and Source of Terms

Separation of powers means that one branch of government shall not exercise the powers nor perform the functions of the other two branches or either of them. It was first introduced into our American system of Jurisprudence by George Mason at Williamsburg, Virginia, in the Spring of 1776. It is found in the Virginia Declaration of Rights and the first Constitution of Virginia adopted in June of 1776. Virginia's basic documents are the source of our Declaration of Independence and the model for our State and Federal Constitutions and Bills of Rights. In any case, separation of powers means the rule of law and not of men.

Delegation of powers means that one or more branches are authorized by law to exercise the powers and perform the functions of the other two or either of them. It was developed out of Acts of Congress generally and the Administrative Procedure Act of 1946 and an obscure 1949 amendment to the Judicial Code of the United States in particular. In addition to giving legislative and judicial powers to the Executive Branch, Congress also gave legislative powers to the Judicial Branch. Congress also acquiesced in the exercise of executive powers by the Judicial Branch. At the same time, Congress tries to exercise all three powers of government itself. In simple terms, delegation of powers means the rule of men and not of law.

Discussion

The Iran/Contra hearings have pointed up the need to reseparate our powers of government. Congress should be required to confess error and to begin doing business as intended by our Founding Fathers.

Separation of powers is not only the heart and substance of the rule of law, but also the cornerstone of American freedom and religious liberty. Likewise, separation of powers is the Key to our Constitutional system of checks and balances. Moreover, James Madison declared unequivocally that separation of powers "is the most sacred principle of our Constitution, indeed of any free constitution". It may be truly said that separation of powers is the real foundation of American democracy and our Constitutional republic.

The Congressional practice of delegating our powers of government not only diffuses our Constitutional system of checks and balances, but also substitutes the rule of men for the rule of law. For example, the public practice of delegation of powers established a "fourth branch of government" not sanctioned by our Constitution. That is, Congressional delegations of power substituted an autocratic bureaucracy for our republican form of government.

The public practice of delegation of powers is also the proximate cause of an astronomical public debt fueled by deficit spending. Furthermore, delegation of powers has produced unpredictable political problems such as those generated by Viet Nam, "Watergate" and the Iran/Contra debacles.

Delegations of power found in the Administrative Procedure Act and the 1949 amendment to the Judicial Code conflict with statements made by members of both Select Committees. In addition to giving the Executive Branch the power to "prescribe law or policy", (Administrative Procedure Act, 60 Stat. 237, 1946) Congress also gave the "rule making" power to the Judicial Branch (1949 amendment to the Judicial Code, 63 Stat. 104). The legislative histories of those giveaway Acts of Congress disclose an intention to favor the rule of men over the rule of law. Such giveaway statutes also tend to break down our Constitutional system of checks and balances. In fact, those particular Acts of Congress exhibit a deliberate attempt to obliterate our own unique American doctrine of separation of powers.

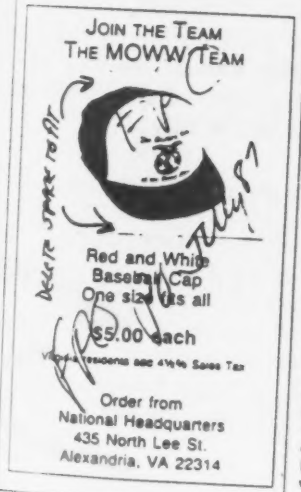
Aside from the conflict of laws generated by delegation of powers, the Iran/Contra hearings are flawed in other material respects. Select Committee members and their counsel

were perceived by many Americans as being intent upon puffing up the record with their own self-serving statements. Such statements failed to account for the adverse effect of delegation of powers upon the rule of law and our Constitutional system of checks and balances. Moreover, the "witnesses" were treated as if they were being cross examined in an adversary proceeding.

Conclusion

The time has come for Congress to investigate itself instead of trying to blame others for its own shortcomings.

Editor's Note: Captain Minnick is President of Patriotic Education Incorporated, the publishing arm of MOWW's Patriotic Education Foundation. He will be retiring from PEI September 17, 1987 in order to give his full time and attention to his Bicentennial projects. He says that the Iran/Contra hearings have given his "Virginia Plan" a new lease on life. The "Virginia Plan" is a composite of the "George Mason Promotion" and the "George Washington Project", and is being developed for the Bicentennial of the Bill of Rights in 1991.



OFFICER'S CALL

by
Karl B. Justus
Chairman, Magazine Committee

COMMENTS: We assume it was a "great convention" in Tucson which, in the main, will be in the October magazine, so we'll just say to the Companions of our host chapter, "Well done!"—Trying to write this column for September is the toughest one of the year. Written two months before anyone will see it (this is 20 July), largely from such May and June chapter bulletins as are at hand, it is hardly possible to make this current reading. So, we'll just try to report what seems interesting (or representative). From nearly every chapter's newsletter we could report "installation of officers"—or—"the students who attended the Youth Leadership Conference(s) gave a report."—Notably, our own Capt. **John Minnick**, who has been giving such fine (giving is the word) leadership and dedication to Patriotic Education, Inc., wrote an impressive, on-the-mark letter to **Senator Daniel Inouye**, Chairman of the Senate Select Committee, on 11 July in the midst of the Iran/Contra Hearings, **Capt. Minnick**, an ardent, legal student of the U.S. Constitution, as an attorney, has devoted most of his time and talent toward emphasizing the vital importance of the doctrine of the "Separation of Powers" as opposed to the "Delegation of Powers." If the letter is not reproduced elsewhere in this issue, we will see to it that the thrust of the letter is shared with all Companions. We are sorry Capt. Minnick decided to leave PEI on 17 September, but we all do wish him well in his continuing effort to get all three branches of our Government to put back into practice the "Separation of Powers." Good luck, **John**, and for America's sake, may success attend your mission.—Many of us remember the early, desperate months of WW II in the Pacific. Of incalculable significance was 4 June 1942, date of the Battle of Midway—"the day a war was turned around..." Of the men of Midway, historian **Sam Elliot** wrote, "Think of them, reader, every Fourth of June." This year marked the 45th anniversary of Midway, the battle which American Naval Forces won against great odds—with fewer vessels and planes—because on the bridge of one of our three aircraft carriers, the USS Yorktown, was a genius named **Admiral Raymond A. Spruance, USN.** Well, on 7 June this year, Capt. Gil **Slonim**, USN (Ret), arranged and hosted a 45th anniversary reception in memory of **Admiral Spruance**, "the victor at Midway," and the brave men who fought with him—many of whom lost their lives. The reception was held in a refurbished old Washington mansion at Massachusetts Ave. & 21st St. in our Capital City. **Capt Slonim**, a remarkable naval officer in his own right, has a great sense of history and an appreciation for the same. A Naval Academy graduate, **Capt. Slonim** was in the thick of the war in the Pacific from Pearl Harbor on. At various times he served on the staffs of **Admirals Spruance, Halsey** and Nimitz. An Intelligence Officer, he was, also, the official interpreter whenever the Japanese were involved and fulfilled that capacity at the formal surrender aboard the "Mighty Mo!" Attending the reception were several shipmates who, like Capt. **Slonim**, had served with **Admiral Spruance** at the Midway engagement and elsewhere. Additionally, other military officers and government officials were aboard to "remember" on that 45th anniversary. At Capt. **Slonim's** request, this old Navy Chaplain of Pacific battles (yours truly) wrote and gave a special, memorial prayer. **President Reagan** sent a special letter to Capt. Slonim, which read, in part: "... History is made by human beings: decisions made by a handful can mean the

SPECIAL COMMITTEE ON FEDERAL JURISDICTION RULES AND PROCEDURE

Foreword

Purpose

This report is designed to uncover the destruction of our constitutional system of checks and balances by prior Congresses of the United States and to expose the curret cover up effort of the 93d Congress.

Scope

The Special Committee on Federal Jurisdiction Rules and Procedures focused primarily on rules of evidence, division of jurisdiction, executive privilege, impeachment, and separation of powers. Five relevant legislative proposals were selected out of many for discussion.

Effect

Hopefully, the practical effect of this report will be to strip off the double standard of conduct enshrouding "Watergate" and related matters including the current impeachment proceedings. The beneficial effect will be to shed new light on fundamental principles of constitutional law once taken for granted and long since forgotten.

Background

Thirty-fifth Annual Meeting

This report is directly attributable to the splendid presentation by the panel on the proposed Federal Rules of Evidence at the 35th annual meeting of the Virginia State Bar. The panel recommended the appointment of a committee to study the proposed rules and to make suggestions on or before July 30, 1973.

Committee

By letter dated June 22, 1973, President Howard created the Committee to

Study Federal Rules of Evidence and named John B. Minnick as chairman and Gregory U. Evans and Plato Cacheris as members to serve with him.

The committee immediately secured copies of the hearings, bill, and related materials on H.R. 5463 on the proposed Federal Rules of Evidence.

Preliminary Report

A preliminary report was submitted July 23, 1973, to point out among other things that the proposed rules, hearings, and related materials raised serious constitutional questions under the doctrine of separation of powers.

Enlargement

In the meantime, S. 1876 on the proposed division of jurisdiction between State and Federal courts was referred to the committee for study and comment. Additionally, the committee was redesignated the Special Committee on Federal Jurisdiction Rules and Procedure and its functions were enlarged to include monitoring Congress. The work and plans of the Special Committee were outlined and reported at the fall conference in Staunton.

Preliminary Report

In a preliminary report dated September 26, 1973, the Special Committee pointed out that the principal question raised by the proposed Federal Rules of Evidence involved the doctrine of the separation of our powers of government under the first three articles of the Constitution; and that the big question raised by the proposed division of jurisdiction between State and Federal courts involved the concept of the equal protection of the law under the Fourteenth Amendment as applied to both State and Federal Governments by the courts. The Special Committee also announced that it planned to ask for hearings on the constitutional questions raised by both bills, and requested that the announcement be circulated. The announcement was published in the November-December 1973 issue of the Virginia Bar News.

Monitoring Service

The monitoring services of the Special Committee picked up information on several legislative proposals including H.R. 12135 and H.R. 12462 on amendments to the Freedom of Information Act, S. 2803 to insure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States, and S. 2978 to establish a special commission to study the establishment of an independent permanent mechanism for the investigation and prosecution of official misconduct and other offenses committed by high Government officials. The particular relevance of these legislative proposals determined the thrust of this report.

The Legislative Proposals

H.R. 5463 Proposed Federal Rules of Evidence

This legislative proposal originated in a suggestion made by former Chief Justice Warren; but the suggestion was caused by the so-called "enabling acts" which gave the Court the power to prescribe the rules, and in particular by the last one contained in the Act of May 24, 1949, Ch. 39, section 103, 63 Stat. 104. The provisions of that Act gave the Supreme Court the power to make its own rules and constituted a grant of the legislative power reserved to the Congress as one of our checks and balances under Article III of the Constitution.

After the Court was given the power to make its own rules, it proceeded to

adopt its own rules and of course threw out the old rules including the rules relating to evidence. Since the new rules do not constitute part of the supreme law of the land under Article VI of the Constitution, the suggestion by former Chief Justice Warren appears to have been made in an obvious effort to cover up the destruction of one of our constitutional checks and balances.

After the suggestion was made by the Chief Justice, a special committee was appointed to study the feasibility of establishing uniform rules of evidence for the Federal judicial system. The special committee determined that it was feasible. An Advisory Committee on Rules of Evidence was appointed and H.R. 5463 is the result of the work of the Advisory Committee. When that committee commenced its work, however, it established several criteria, one of which was the avoidance of constitutional issues. Hearings, page 91; Congressional Record for Wednesday, January 30, 1974, page H 307.

H.R. 5463 encountered a stormy reception in Congress and the rules as proposed by the Advisory Committee were rejected. Pub. L. 93-12, March 30, 1973, 87 Stat. 9; see also, 119 Cong. Rec., No. 22, February 7, 1973, S 2241-2242; 119 Cong. Rec., No. 40, March 14, 1973, H 1721-1731; 119 Cong. Rec., No. 42, March 19, 1973, S 4493-5009; Federal Bar Journal, Evidence, Part I, Volume 32, Number 4, Fall 1973.

While the debates were going on in Congress, the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary was holding hearings on the proposed rules of evidence. Those hearings demonstrate the failure to account for fundamental principles of constitutional law despite some self serving statements seemingly to the contrary. Thus it appears that "Constitutional issues would be avoided to the extent possible, on the theory that the formulation of rules was not in general an appropriate method of resolving them." Hearings, page 91; see also, Hearings, page 35; and the Congressional Record for Wednesday, January 30, 1974, page H 307.

As a result of the 1973 hearings and mark up session, most of the controversial provisions of the proposed rules were eliminated, and a much modified version of H.R. 5463 was reported to the House November 15, 1973. H. Rept. No. 93-650, 93d Cong., 1st Sess. The proposed rules as revised by the House Committee on the Judiciary were passed by the House with floor amendments, February 6, 1974, 120 Cong. Rec., No. 12, page H 570; and referred to the Senate. H.R. 5463 as modified by the House was read twice in the Senate and referred to the Committee on the Judiciary. 120 Cong. Rec., No. 13, February 7, 1974, S 1552.

The Special Committee has requested a hearing on the constitutional issues.

There are other defects in the proposed Federal Rules of Evidence. The Advisory Committee's notes, the hearings, the committee report and related materials do not establish a need for black letter statutory rules of evidence. The danger of a black letter statutory rule on presumptions is glossed over under the guise of labelling the rule a technical matter. The treatment of evidence generally and hearsay in particular fails to account for the fundamental rule of exclusion where the evidence is not competent to prove the truth of the matter asserted.

S. 1876 Proposed Division of Jurisdiction between State and Federal Courts

As in the case of the proposed rules of evidence, the proposed division of jurisdiction arose out of a suggestion by former Chief Justice Warren in proposing the study, he stated:

"It is essential that we achieve a proper jurisdictional balance between Federal and State court systems, assigning to each system those cases most appropriate in light of basic principles of federalism."

The American Law Institute acted upon his suggestion and made a ten-year study of the jurisdiction of Federal Courts. S. 1876 is the result of that study and covers six broad areas of Federal jurisdiction: diversity of citizenship; Federal question jurisdiction; jurisdiction of the United States as a party; admiralty jurisdiction; jurisdiction of three-judge courts; and multi-party-multi-state litigation.

The initial suggestion by the Chief Justice did not account for the fact that the judicial power of the United States under the Constitution does not extend to the assignment of the jurisdiction of the State courts; and neither does the legislative power in the absence of a proper amendment.

Aside from the ramifications of the American Law Institute proposal, the bill is described at the very outset as "lawyers' law." Hearings, page 98. As such, the proposal is reduced to an effort to impose a set of arbitrary standards for the benefit of the legal profession without regard to the rights of the people to the equal protection of the law guaranteed by the Fourteenth Amendment. Accordingly, the proposal may be classified as a rule of men and not of law.

The Special Committee on Federal Jurisdiction Rules and Procedure has requested a hearing on the constitutional aspects of the proposed division of jurisdiction

H.R. 12135 and H.R. 12462 To Amend the Freedom of Information Act.

H.R. 12462 is the result of executive mark ups of H.R. 12135. The basic proposal to amend the Freedom of Information Act, 5 U.S.C. (1970 ed.) section 552, originated in the efforts of the courts and Congress to get information from the executive branch and involves the executive privilege concept. Additionally, the hearings, bills and related materials manifest an effort to lay a foundation for contempt proceedings in order to lend some color of criminality to possible impeachment charges. See particularly, the provisions of the bills for filing law suits in the United States District Court for the District of Columbia; see also, Hearings, pages 6113 et seq.

Of course the difficulty with the proposal lies in the fact that 5 U.S.C. section 552 is part of the Administrative Procedure Act of 1946, 60 Stat. 237, as codified and enacted into positive law in 1966, 80 Stat. 378, 381-388, now 5 U.S.C. (1970 ed.) sections 551-559. By the express terms of the Administrative Procedure Act, the executive branch and the so-called "independent agencies" were given the power to "prescribe law or policy". 5 U.S.C. (1970 ed.) section 551. The grant of legislative power by Congress to the executive branch is not only inconsistent with our great American doctrine of separation of powers, it also destroys our constitutional system of checks and balances. Additionally, the grant of legislative power to the executive branch is the proximate cause for the recent assertions of executive privilege.

S. 2803 To Insure the Separation of Constitutional Powers by Establishing the Department of Justice as an Independent Establishment of the United States

This legislative proposal is the product of the constitutional confusion generated by the destruction of our constitutional system of checks and balances by prior Congresses of the United States; and, as such, manifests an effort in the 93d Congress to cover up that destruction.

S. 2978 To Establish a Special Commission to Study the Establishment of an Independent Permanent Mechanism for the Investigation and Prosecution of Official Misconduct and other Offenses Committed by High Government Officials.

This proposal arises out of the same problem, namely, "Watergate," that produced S. 2803 and H.R. 12462. As such, it represents another layer in the attempted cover up of the destruction of our constitutional system of checks and balances.

Discussion

The Special Committee on Federal Jurisdiction Rules and Procedure has uncovered two of the specific Acts of Congress which have destroyed our constitutional system of checks and balances. In addition, the Special Committee desires to point out that there is nothing in the Constitution to prevent one branch of government from exercising the power of the other two branches. Accordingly, the only constitutional way to insure the separation of our powers of government is not to give any of them away.

By the act of giving away constitutional powers, the Congress of the United States has not only made it impossible to maintain the separation of powers, it has also reduced us to a government of men and not of law.

"Watergate" is merely the manifestation of the constitutional confusion of the rules generated by the "giveaway" acts of Congress. The impeachment proceedings stand on no better footing. Those proceedings are the direct result of the confusion and reflect the charges and countercharges generated when one branch of government compounds the mistakes and errors of another branch.

Since the problem is essentially a question of the rules, the Special Committee on Federal Jurisdiction Rules and Procedure desires to furnish a brief analysis of the real reason for the separation of our powers of government.

The Legislative Branch operates under the rules of parliamentary procedure.

The Executive Branch operates under administrative rules and regulations including executive orders.

The Judicial Branch operates under the rules of court subject to the rules of evidence.

The rules of parliamentary procedure do not work in the Executive and Judicial Branches.

Administrative rules, regulations and executive orders do not work in the Legislative and Judicial Branches.

Rules of court and evidence do not work in the Executive and Legislative Branches.

The reason why the rules of one branch do not work in the other two branches is essentially a matter of functions.

The legislative function is essentially a policy making function.

The executive function is essentially a policy keeping function.

The judicial function is essentially a policy applying function.

When all three branches are actively engaged in making national policy, there are bound to be not only honest differences of opinion, but also diametrically opposed points of view.

"Watergate" with its ramifications including impeachment proceedings is a

classic example of what can happen when all three branches are busy exercising legislative powers. In short, the current confusion in government today is directly attributable to the destruction of our constitutional system of checks and balances by the Congress of the United States.

Findings

The Special Committee on Federal Jurisdiction Rules and Procedure finds:

1. The hearings, debates, committee report and related materials on H.R. 5463 do not demonstrate any real need for black letter statutory rules of evidence. Additionally, the hearings, debates, committee report, and the proposed Federal Rules of Evidence demonstrate not only a failure to account for elementary principlesof jurisprudence, but also the deliberate avoidance of constitutional issues.

2. The hearings and related materials on S. 1876 do not demonstrate any real need for the division of jurisdiction between State and Federal Courts. Additionally, the hearings and related materials demonstrate an insensitivity to the needs of the people as well as a general avoidance of constitutional issues.

3. The hearings and related materials on H.R. 12462 demonstrate the efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.

4. S. 2803 and S. 2978 demonstrate further efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.

5. The impeachment proceedings manifest the overall effort to cover up the destruction of our constitutional system of checks and balances.

Conclusions

The Special Committee on Federal Jurisdiction Rules and Procedure concludes

1. Our education in the field of Constitutional Law has been sadly neglected.

2. The Executive and Judicial Branches have compounded the mistakes and errors committed by the Legislative Branch.

3. The 93d Congress is fatally bent on covering up the destruction of our constitutional system of checks and balances.

Recommendations

The Special Committee on Federal Jurisdiction Rules and Procedure recommends

1. Establishment of a permanent standing committee on Constitutional Law.

2. Transfer the functions of the Special Committee on Federal Jurisdiction Rules and Procedure to the permanent standing committee on Constitutional Law.

3. Conduct a Constitutional Workshop at the Thirty-Sixth Annual Meeting of the Virginia State Bar.

4. Establish Constitutional Workshops in the Law Schools of Virginia.

5. Conduct the pilot project at the Washington and Lee University Law School in conjunction with its student research program.

Respectfully submitted,
John B. Minnick, *Chairman*

MBELDEF
Minority Business Enterprise Legal Defense
and Education Fund, Inc.

STATEMENT IN OPPOSITION TO THE APPOINTMENT

OF JUDGE ROBERT H. BORK TO THE

UNITED STATES SUPREME COURT

This statement represents the views of the Minority Business Enterprise Legal Defense and Education Fund on the nomination of Judge Robert H. Bork to the U. S. Supreme Court. The Fund is a non-profit public interest organization established to enhance, defend and expand minority business development through litigation, legislation, and educational activities. The primary mission of the organization is the legal defense of the class interests of the minority business community.

Principally, the Legal Defense Fund engages in three types of litigation:

1) legal defense of minority business development legislation that is under constitutional attack;

2) enforcement actions to compel governmental agencies to comply with the law; and

3) suits attacking racial discrimination or harassment and exclusion of minority businesses from the marketplace.

Accordingly, Supreme Court rulings that address civil rights, affirmative action, and antitrust enforcement issues are of critical importance to the work of the Legal Defense Fund. The Supreme Court's rulings on these key issues have profound impact on our constituency of minority-owned businesses.

Parren J. Mitchell
Founder and Chairman

300 "I" Street, N.E., Suite 200
Washington, D.C. 20002
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Anthony W. Robinson, Esq.
President

In assessing the suitability of Judge Robert H. Bork for an appointment to the U. S. Supreme Court, we have focused primarily on Judge Bork's judicial philosophy, his ideological views on key issues, his judicial temperment, and the likely implications for the minority business community resulting from this proposed appointment.

Judicial Philosophy

Judge Bork portrays himself as a judicial conservative, that is, one who exercises restraint in interpreting the law. In theory, an apostle of judicial restraint gives great deference to legislative intent and construes the Constitution strictly to include only those rights that are expressly provided for or intended by the framers. However, a close examination of Bork's legal writings reveals curious contradictions in his judicial philosophy.

With respect to court enforcement of antitrust laws, Bork has been a strong advocate of judicial activism. Judge Bork has made it abundantly clear in his writings that in his estimation, all twentieth century antitrust statutes, while not unconstitutional, are "irrational" because they do not further economic efficiency. According to Bork, "Congress as a whole is institutionally incapable of the sustained rigor and consistent thought that the fashioning of a rational antitrust policy requires." The Antitrust Paradox, p. 412. Because of his contempt for populist Congressional intent behind the antitrust laws, Bork urges the courts to ignore the will of Congress when it comes to enforcement of those laws. In an apparent invitation for judicial activism, Bork has concluded:

> No court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with the specific antitrust laws. Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary. (Id., p. 410).

In further contradiction of Bork's alleged philosophy of judicial restraint, he states:

> Even in statutory fields of law, courts have obligations other than the mechanical translation of legislative will, and these obligations are particularly important with statutes as open-textured as the antitrust laws.(Id., p. 72). (emphasis added.)

Further evidence of Judge Bork's lack of restraint can be found in his views regarding the powers of the executive branch of government. In analyzing the constitutionally mandated powers of the President, Bork suffers a serious lapse of memory as to the basic tenet of judicial restraint -- namely that the Constitution should be read narrowly to convey only those rights and powers clearly stated and intended by the framers.

For example, in a 1971 law review article and again at his confirmation hearings for appointment as Solicitor General, Bork justified President Nixon's order for the bombing of Cambodia as stemming from the "inherent powers of the Presidency". American Journal of International Law, p. 69. (January 1971); 1973 Confirmation Hearings, at p. 9. Oddly enough, Judge Bork is unable to find similar "innerent powers" for Congress under the 14th Amendment to remedy the effects of racial discrimination through affirmative action. Apparently, Bork believes such liberal interpretations of the Constitution should be reserved in favor of the Executive Branch.

In 1973, as Acting Attorney General, Bork again stretched the limits of the law to satisfy the prerogative of the Chief Executive by firing Special Prosecutor Archibald Cox. In satisfying the President's wishes, Bork purposely ignored the Department of Justice Charter which provided that the Special Prosecutor could be removed only for "extraordinary impropriety". In Bork's mind, however, the privilege of the Chief Executive reigned supreme.

Nevertheless, in other areas of the law, Judge Bork lives up to his professed belief in judicial restraint. Bork takes a consistently narrow view of the Constitution with respect to 14th Amendment equal protection and affirmative action issues, voting rights, the right to privacy, and freedom of speech cases. In case after case affecting individual rights and liberties, Bork severely criticizes the Supreme Court for expanding the Constitution to encompass rights and remedies for violations of rights that are not expressly provided for.

The question remains, then, as to the true nature of this judicial animal. Is Judge Bork a judicial activist, or an apostle of judicial restraint? In light of the glaring inconsistencies in Bork's approach to the law, we are left with no alternative except to conclude that he is neither. Rather, it is our strong suspicion that Judge Bork is a judicial chameleon. He has failed to consistently demonstrate a principled approach to the resolution of legal issues. Judge Bork's judicial philosophy on any given issue is determined with startling predictability by the subject matter of the issue. Bork tends to be an advocate for judicial restraint in dealing with legislation he favors (e.g., restrictions of individual rights and liberties). On the other hand, he becomes a judicial activist when

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dealing with laws that he opposes (e.g., antitrust laws and laws impinging on property interests).

Ideological Views

Our suspicion that Bork's judicial philosophy is determined by his desired outcome and not vice versa, has been strongly confirmed by the survey of Judge Bork's judicial record compiled by Public Citizen's Litigation Group. This survey shows that in split decisions in the D. C. Circuit Court of Appeals in which Judge Bork participated, the outcome of his vote can be predicted with almost complete accuracy simply by identifying the parties in the case.

For example, in split cases where the government is a party, Judge Bork came down on the side against consumers, environmental groups, and workers nearly 100% of the time. Similarly, Judge Bork's vote favored the executive in every one of the seven split decisions in which public interest organizations challenged regulations issued by federal agencies. (None of these public interest organizations were "conservative" public interest groups, such as the Heritage Foundation). In six split decisions where the government was sued by individuals for violations of civil rights and civil liberties, Judge Bork's vote went against the individual each and every time.

This strikingly high correlation between subject matter/party and outcome in Judge Bork's decisions further belies the notion that Judge Bork consistently adheres to a judicial philosophy and applies it in a manner devoid of ideological considerations. If Judge Bork applied the law in a neutral manner, one would expect to find greater variation in his decisions along ideological lines.

Accordingly, Judge Bork's ideological positions on a number of key issues take on added significance as these views are likely to have a significant impact on his decisions affecting small and disadvantaged businesses.

Antitrust Law

Judge Bork's views on antitrust law are clearly set forth in his treatise, The Antitrust Paradox. Bork advocates that the only horizontal mergers (i.e., mergers between competitors) that should be prohibited by law are those that reduce the number of competitors in a market to less than three. In other words, if Bork were to have his way, any merger that left a market with at least three firms remaining would be legal per se. In this antitrust world according to Bork, current trends towards increased concentration in the marketplace would accelerate to the point where three-firm oligopolies would become commonplace.

The implications of such increased market concentration for minority and small economically disadvantaged businesses would be devastating. Barriers to entry for such firms would be raised to nearly insurmountable levels. The deep pockets of the oligopolies coupled with their sheer economy of scale advantages would present formidable obstacles to any small or minority firm contemplating entry into markets heretofore not approached by these kinds of firms. As there are already far-too-many markets that are foreclosed to minority businesses through the "old-boy" network, the minority business community can ill afford to be confronted by the increased collusion and concentration of economic power that would likely

result from Judge Bork's vision of relaxed horizontal merger enforcement.

Similarly, Judge Bork opposes vertical market restraints (e.g., prohibitions against price-fixing and boycotts between suppliers and customer firms). Moreover, Bork frowns upon prohibitions against price discrimination, wherein a supplier favors one customer firm with lower prices for products of like grade and quality than it offers to its customer's competitor. Again, this version of the antitrust world according to Bork would place minority-owned firms at an even greater disadvantage in overcoming the systemic racism that pervades the American marketplace. Minority firms are all-too-often subjected to higher costs than their competitors by nature of supplier discounts to their competitors and by way of supplier surcharges to minority firms. In other instances, minority firms are confronted with supplier boycotts -- that is, absolute refusals to sell to minority firms at any price. Bork's theory of antitrust enforcement would eliminate the legal remedies for small and economically disadvantaged firms that are faced with such exclusionary behavior on the part of suppliers and entrenched firms.

14th Amendment - Equal Protection - Affirmative Action

Judge Bork's ideological positions on the 14th Amendment Equal Protection Clause and affirmative action remedies are equally dismal for the minority business community. In 1972, Bork was one of only two law professors to testify in support of the constitutionality of legislation that severely curtailed school desegregation remedies

that had been deemed necessary by the Supreme Court to cure violations of the 14th Amendment. Hundreds of other law professors testified contrary to Judge Bork's position. Moreover, as Solicitor General, Bork continued to take a narrow view of affirmative action remedies for school desegregation. In fact, he was ultimately overruled by Attorney General Edward Levi in his efforts to curtail such remedies by bringing the Boston school desegregation case to the Supreme Court. Similarly, Bork was unsuccessful in his opposition to fair housing remedies for low income black citizens where the federal government had participated in discrimination. Hills v. Gautreaux, 425 U.S. 284 (1976). Bork has also expressed his opposition to affirmative action remedies for employment discrimination.

In light of Judge Bork's general disdain for affirmative action remedies, it is highly unlikely that he would be inclined to have a favorable view of minority business set-aside remedies should he be appointed to the Supreme Court. Obviously, the Court's delicate balance on affirmative action cases would be tipped in a direction away from the Fullilove precedent. As there are already several conflicting decisions in the Circuit Courts regarding the legality of set-asides, there is a good possibility that the issue would come before the Supreme Court within Bork's tour of duty. Should Bork's opinion carry the day on this issue, it would most likely result in a significant economic shift totalling tens of billions of dollars away from the minority business community.

Judicial Temperment

These ideological positions of Judge Bork would not be nearly as troubling to minority business interests if we could be certain that his judicial temperment was such that he would be capable of putting his personal views aside, giving a fair hearing to the facts and legal arguments, and applying legal precedents and legislative intent in a principled fashion.

However, there are several aspects to Judge Bork's judicial temperment that give us pause. For one, the harshness of Bork's criticism of numerous Supreme Court rulings and his downplaying of the will of Congress borders on disrespect and outright arrogance. The following are some of Bork's typically strident characterizations of Supreme Court decisions contained in the 1971 Indiana Law Journal:

-- "improper and intellectually empty" [Skinner v. Oklahoma, 316 U.S. 535 (1942), striking down an Oklahoma law that provided for the sterilization of convicts];

-- "unprincipled" and "utterly specious" [Griswold v. Connecticut, 381 U.S. 479 (1965)];

-- characterizing Justice Warren's opinion in Baker v. Carr as unable "to muster a single respectable supporting argument".

Moreover, Bork's disdain for the intelligence of Congress is also quite evident.

-- "Congress as a whole is institutionally incapable of the sustained rigor and consistent thought that the fashioning of a rational antitrust policy requires." (Antitrust Paradox, p. 412)

-- No court is constitutionally responsible for the legislature's intelligence ... Courts that know better ought not to accept delegations [from the legislature] to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary." (Id., p. 410)

Judge Bork is equally generous in his criticism of the Supreme Court's intellectual capabilties. Judge Bork condemns Justice Frankfurter's 1949 Standard Stations opinion because it rests "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly upon the asserted inability of courts to deal with economic issues." (Id., p. 301). According to Bork, Justice Douglas' "murky" conglomerate merger opinion in Proctor Gamble "makes sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense." (Id., p. 255). Judge Learned Hand's influential Alcoa monopolization opinion "stands revealed" to Judge Bork "as a thoroughly perverse judicial tour de force contrary to ... the entire spirit of antitrust.". (Id., p. 170). This level of verbal hostility raises serious concern that, given an opportunity, Judge Bork would demonstrate a lack of respect for the doctrine of stare decisis and would literally reshape the law in his own image; an image that is incompatible with the interests of the small and minority business communities.

In addition to this brand of intellectual arrogance, Bork has demonstrated a troubling degree of intellectual dishonesty. As discussed previously, Bork has feigned utter blindness to the legislative history of the antitrust laws in advocating his basic premise that economic efficiency was the sole object of antitrust laws. No honest reading of the legislative history of these laws could possibly ignore the social and political concerns that Congress sought to address through antitrust legislation. Clearly, much of the antitrust laws are aimed at protecting small business from the adverse effects of concentrated political and economic power in oligopolistic markets.

Finally, Judge Bork's handling of the firing of Archibald Cox raises serious questions about his moral integrity. Special Prosecutor Cox had certainly been guilty of no "extraordinary impropriety". Yet, Bork did not hesitate to be the hatchet man in following the orders of an embattled Chief Executive to relieve Mr. Cox of his duties.

Conclusion

When all of these factors are taken into consideration, there is little doubt but that the appointment of Judge Robert H. Bork to the U. S. Supreme Court would be an unmitigated disaster for the interests of small and minority-owned businesses. Given his unstable judicial philosophy that appears to change directions to reach predetermined outcomes; given his ideological positions on civil rights and antitrust laws that are consistently adverse to the interests of small and minority-owned businesses; and given his apparent lack of respect for judicial precedent and Congressional authority, there is precious little that commends this man to sit on the highest court of this land. He simply cannot be trusted to apply the law in a fair and impartial manner.

Perhaps the most disturbing factor of all is Judge Bork's readiness to conveniently reverse his position 180 degrees on certain fundamental civil rights issues (e.g., the constitutionality of racially restrictive covenants and the application of the Equal Protection Clause to women). Judge Bork now readily admits that his previously held strong views on these issues were dead wrong -- that is, until just before confirmation hearings. Had Judge Bork been

appointed to the Supreme Court twenty years ago, he would have reached, by his own admission, the wrong decision on these important issues. Similar failings after appointment to the Supreme Court at this juncture would have disastrous long-term consequences. We urge the Senate Judiciary Committee and all Members of the U. S. Senate to deny Judge Bork the opportunity to make his otner mistaken notions of Constitutional Law a permanent fixture in the landscape of American jurisprudence. **We urge you to oppose the nomination of Robert H. Bork.**

Respectfully submitted,

Parren J. Mitchell
Chairman

Anthony W. Robinson
President

Franklin M. Lee
Chief Counsel
Minority Business Enterprise
Legal Defense and Education Fund, Inc.

BORK v. BORK

A Comparison of Judge Bork's Confirmation Testimony With His Previous Speeches and Articles

A Report of the

NAACP Legal Defense and Educational Fund, Inc.

and

People For The American Way Action Fund

September, 1987

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PREFACE

Robert Bork, nominated to succeed Associate Justice Lewis Powell on the Supreme Court of the United States, testified before the Senate Judiciary Committee from September 15-19, 1987. This report is a compilation of statements by Judge Bork during his confirmation hearing that differ from views previously expressed in his writing and speeches. While some of the differing statements first appeared in Judge Bork's oft-cited Indiana Law Journal article, most were found in speeches, interviews and articles appearing after he became a judge in 1982. In twelve of the 20 subject areas or cases covered during the hearings that are discussed in this report, Judge Bork made statements that appear to be different from other statements he has made within the last two years. This report does not review areas covered during the confirmation hearing in which Judge Bork did not depart from previously expressed criticism of Supreme Court decisions.

PRECEDENT

(1) Adhering to Prior Decisions of the Court

Judge Bork began his testimony with a prepared written statement assuring the Judiciary Committee that he would be extremely reluctant to overrule Supreme Court precedents:

> [T]he judge must speak with the authority of the past and yet accommodate the past to the present.
>
> The past, however, includes not only the intentions of those who first made the law; it also includes those past judges who interpreted it and applied to prior cases. That is why a judge must give great respect to precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought...
>
> [O]verruling should be done sparingly and cautiously. Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our laws.[1]

On the fourth day of the hearing the Committee learned that Judge Bork had made a very different statement on October 8, 1985, during a speech at Canisius College:

> "Question: If I can follow that up. Now, the relationship between the judge, the text,

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1 Statement of Robert H. Bork, pp.3-4; September 15, 1987, tr. pp.116-18.

> and precedent, what do you do about precedent?"
>
> "Mr. Bork: I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important--the reason being that if you construe a statute incorrectly, the Congress can pass a law and correct you. If you construe the Constitution correctly, Congress is helpless. You're the final word. And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it. Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says, 'Well, I respect precedent,' what you have is a ratchet effect, with the Constitution getting further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. I don't think precedent is all that important. I think the importance is what the Framers are driving at, and go back to that."[2]

When asked to explain this remark, Judge Bork asserted that it was merely less complete than the statement which he had made to the Judiciary Committee three days earlier:

> Senator, you and I both know that it is possible, in a give and take question and answer period, not to give a full and measured response. You and I both know that it when I have given a full and measured response, I have repeatedly said there are some things that are too settled to be

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[2] September 18, 1987, tr. pp.100-101.

overturned.[3]

The difference between Judge Bork's 1987 testimony and his Canisius College statement, is not simply that the latter is less complete. The two statements are inconsistent on their face; to assert, as Judge Bork did in 1985, that constitutional precedents are not "all that important," is necessarily to reject the view twice espoused by Judge Bork at his confirmation hearing that these precedents are entitled to "great respect." The fact that Judge Bork's 1987 statement to the Judiciary Committee, unlike his 1985 remark, was a carefully prepared statement, could explain why the 1985 comments omitted an idea or argument found in the later testimony. But the different circumstances of the statements cannot account for the fact that the assurances in Judge Bork's opening statement to the Judiciary Committee do not contain either of the arguments which he detailed in 1985 against giving weight to constitutional precedents.

In a January, 1987 speech to the Federalist Society, Judge Bork expressed a view of constitutional precedent quite different from his September, 1987 testimony:

> Certainly at the least, I would think our originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no

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[3] Id. at 108-109.

> legitimacy. It comes from nothing the framers intended.[4]

Judge Bork argued at his confirmation hearing that this passage was modified by a subsequent remark in the same speech:

> In the next paragraph, which was the typed part of my speech, I then gave an example of non-originalist decisions that should not be overruled. That was a commerce clause decision, not in conformity with the original intent of those who drafted the commerce clause, but that clause has been expanded so much it cannot be cut back and I said that in the next paragraph, so I was certainly not saying you could overrule anything.[5]

But this remark regarding the Commerce Clause in no way detracts from the force of the portion of his speech asserting that a judge should have no problem in principle with overruling any decision misconstruing the intent of the framers. Judge Bork does not suggest that the views of past justices or precedent are entitled to any insight, but comments only that in some cases it may be impracticable to undo the harm caused by earlier erroneous decisions.

On the fourth day of the confirmation hearings Senator Heflin expressed concern that the following passage from an

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[4] Transcript, speech to the Federalist Society, January 31, 1987, p.126 (emphasis added).

[5] September 18, 1987, tr. pp.104-105.

April, 1987 speech by Judge Bork was criticizing the views of earlier judges, and thus constituted a proposal to overrule past decisions:

> "What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations, this will be known and revered as Bork's Wave Theory of Law Reform.
>
> The courts addressed what they regarded as serious social problems after World War II, and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from academics, in sympathy with the courts, politically began to construct theories to justify what was happening. So was non-originalism born. That wave has become a tsunami"--as I understand it, that is a hurricane wave--"tsunami, and its intellectual and moral excesses are breathtaking. These theorists exhort the courts to unprecedented, imperialistic adventures.
>
> But the second wave is rising. When I first wrote on original intent in 1971, one of my colleagues at Yale told a young visiting professor not to bother with it because the position was passe. So, indeed, it was. But it is more than passe. It was, I think, the future as well. There are many more younger people often associated with the Federalist Society and who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years for the second wave to crest, but crest it will, and it will sweep the elegant, erudite, pretentious and toxic detritus of non-originalism out to sea."[6]

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6 September 18, 1987, tr. pp.10-11 (quoting excerpts from speech, Philadelphia Society, April 3, 1987, pp.10-15).

Judge Bork insisted, however, that the speech was only about law professors, and that no judges embraced the "non-originalist" philosophy he had criticized:

> I'm not talking here at all about adhering to the law or to precedent. I'm talking about the way constitutional theory is taught in law schools... [T]his is not at all a discussion of what we're going to do with the cases, the court has decided... This entire speech is a talk about constitutional theorists in the academy... [T]his entire business is about legal academics. I think if you read it, you will see it is an argument with professors about how to deal with the Constitution... I must say no court has gone anywhere near as far as some professors think they should and are urging them to, to create constitutional law.[7]

Elsewhere in the same speech, however, Judge Bork did refer to judges, and asserted that judges had utilized in their opinions precisely the "non-originalist" approach which Bork proposed to sweep away:

> We know from reading their opinions that many of today's judges do not think themselves bound by the original intent, and now we have judges saying so openly... What used to be a shameful secret, and is now just beginning to be admitted, may one day be universally and proudly avowed as the judge's duty.[8]

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7 September 18, 1987, tr. pp.10-11.

8 Speech, Philadelphia Society, April 3, 1987, pp.3-6.

In other speeches Judge Bork repeatedly asserted that existing judicial opinions were the result of the "non-originalist" theory which he condemned:

> Non-interpretivism advances... the... view that... courts are not confined to following the Constitution but may, in significant respects, remake the Constitution... I do not know whether many federal judges consciously adhere to all of the implications of this theory but it is fair to say that a great many judges behave as if they followed non-interpretivism.[9]

> Many judges... now believe that the Court's obligations to intent are so highly generalized and remote that judges are in fact free to create the Constitution they think appropriate to today's society.[10]

> We now have a court... which is creating individual rights which are not to be found in the Constitution by any standard method of interpretation. The Court itself, from time to time, admits that [w]hat the courts are doing... is in fact to create new constitutional values which are nothing more than the imposition of upper middle classes values on the society... It is now a trucid [?] fact... that the question of whether or not a particular result is rooted in the Constitution is one that is no longer central

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9 Speech, Virginia Bar Association, January 10, 1986, p.2 (emphasis added).

10 R. Bork, "Judicial Review and Democracy," Encyclopedia of the American Constitution (1987) (emphasis added).

to the inquiry of the Courts.[11]

(2) Areas of Law Too Settled to Overturn

On several occasions before 1987 Judge Bork had stated that it might be impossible to overturn an incorrect Supreme Court decision if major government programs or private institutions had grown up around and in reliance on that decision. Prior to his 1987 confirmation hearing, however, the only area in which Judge Bork had even suggested that reliance precluded overruling incorrect precedents was regarding the interpretation of congressional power under the Commerce Clause.[12]

On the opening day of his confirmation hearing, Judge Bork initially cited the Commerce Clause cases as a situation in which governmental and institutional reliance precluded correcting any past decisions.[13]

Shortly thereafter he asserted that the Legal Tender

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11 Speech, Federalist Society at Yale, April 24, 1982, pp.4-5 (emphasis added).

12 See e.g., "A Talk with Robert H. Bork," District Lawyer, vol. 9, no.5, p.32 (May/June 1985).

13 September 15, 1987, tr. p.123, see also id., at 165; September 16, 1987, tr. p.100; September 17, 1987, tr. p.210; September 18, 1987, tr. pp.8, 46, 107.

decisions could not be considered for the same reason.[14] After Judge Bork's adherence to precedent had been questioned by the Committee, Judge Bork added that some First Amendment decisions could no longer be reconsidered in light of the fact that the communications industry has been established in reliance on certain aspects of the First Amendment jurisprudence.[15]

On the fourth day of the hearing, Judge Bork went further, arguing that because of private or governmental reliance it was too late to correct any error the Supreme Court might have made in incorporating the Bill of Rights into the Fourteenth Amendment[16] or in extending the coverage of the Equal Protection Clause to groups other than racial minorities.[17] Judge Bork again asserted that such reliance precluded reconsideration of some First Amendment doctrines, but did not limit that comment, as before, to the reliance of the communications industry.[18] Judge Bork also asserted on the fourth day that, in addition to these specified areas of the law, there were "many" other constitutional decisions that for the some reason could no longer

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14 September 15, 1987, tr. p.124; see also id. at 165; September 18, 1987, tr. pp.8, 46, 107.

15 September 15, 1987,tr. p.167.

16 September 18, 1987, tr. pp.8, 46.

17 Id. at 46, 107.

18 Id. at 46, 107.

be overturned.[19]

(3) Agenda of Cases to Reconsider

In the spring of 1985 Judge Bork made the following comment regarding what he might do if he were on the Supreme Court:

> Q. Can you identify any Supreme Court doctrines that you regard as particularly worthy of reconsideration in the 1980's?
>
> A. Yes I can, but I won't.[20]

On the fourth day of his confirmation hearing, Judge Bork assured the Committee:

> I have no ideological agenda and if I did, it would not do me any good because nobody else on the Court has an ideological agenda and I do not intend, if confirmed, to be the only person up there running around with a political agenda. In fact, nothing in my record suggests I have a political or ideological agenda.[21]

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19 Id. at 9; see also id. at 8 ("And so forth").

20 "A Talk with Robert H. Bork," District Lawyer, vol.9, no.5, p.32, May/June 1985.

21 September 18, 1987, tr. pp.113-14.

FREE SPEECH

(4) First Amendment Protection for Nonpolitical Speech

In 1971 Judge Bork argued in an article in the Indiana Law Journal that the First Amendment protects only "speech concerned with governmental behavior, policy or personnel," and "does not cover scientific, educational, commercial or literary expressions as such."[22] In a 1979 speech Judge Bork reiterated this view:

> [T]here is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.[23]

During his 1982 confirmation hearing, Judge Bork reiterated this view, "It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested."[24] In 1984, following a series of articles criticizing his view that the First Amendment protects only

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22 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 27-28 (1971).

23 Speech, University of Michigan, February 5, 1979, pp.8-9.

24 1982 Confirmation Hearing, pp.4-5.

political speech, Judge Bork insisted that he no longer held that view:

> As a result of the responses of scholars to my [1971] articles, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes.[25]

During his 1987 confirmation hearing, Judge Bork twice stated that he had abandoned his view that the First Amendment covered only explicitly political speech shortly after the publication of his 1971 article.

> I have since been persuaded--in fact I was persuaded by my colleagues very quickly--that a bright line made no sense.[26]

> The Chairman: When did you drop that idea?
>
> Judge Bork: Oh, in class right away.[27]

It is somewhat difficult to reconcile these statements with Judge Bork's 1979 speech and his 1982 testimony.

In two 1987 interviews Judge Bork explained that under his

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[25] "Judge Bork Replies," ABA Journal, v.70 (February, 1984).

[26] September 15, 1987, tr. p.186 (emphasis added).

[27] September 16, 1987, tr. p.96 (emphasis added).

new view of the First Amendment a court would have to inquire "on a case-by-case basis" whether a particular book or movie, if not explicitly political, was reasonably related to the democratic process.[28] On the third day of his confirmation hearing, Judge Bork backed away from this case by case proposal:

> Now, I suppose if I went back and rethought the doctrine, which I really haven't rethought since 1971 except to give up on the 1971 bright line, if I went back and rethought it, I would suppose that among other things, it would place too great a burden upon courts to sit down and ask whether this thing feeds the democratic process.[29]

At other points in the hearing Bork testified he did not know whether the First Amendment protected nonpolitical speech:

> [I]f I was starting over again I might sit down and draw a line that did not cover some things that are now covered.[30]
>
> If I were going back to redraw a theoretical line, I do not know where I would draw it.[31]
>
> I don't know where I would come out if I sat

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28 Interview, Public Television, May 28, 1987, pp.34-35; Worldnet Interview, June 10, 1987, pp.24-25.

29 September 17, 1987, tr. pp.191-92.

30 Id. at 20.

31 Id. at 21.

> down now in the absence of Supreme Court precedent and worked out a theory of the First Amendment....[32]

> On this issue I do not know where I would draw the line as an original matter under the First Amendment.[33]

> Where the spectrum ends as a theoretical matter, I do not know.[34]

Judge Bork noted that under existing Supreme Court precedent nonpolitical speech enjoys the same constitutional protection as political speech, and assured the Judiciary Committee "I would accept that line of First Amendment cases gladly, not grudgingly, gladly."[35]

(5) Brandenburg v. Ohio, 395 U.S. 444 (1969).

Brandenburg was a unanimous decision that codified the reigning First Amendment rule regarding speech and advocacy related to violent or otherwise unlawful action:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy is directed to inciting or producing imminent lawless

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32 Id. at 190.

33 Id. at 196.

34 September 18, 1987, tr. p.88.

35 September 17, 1987, tr. p.21; see also id. at pp.190-96.

> actions and is likely to incite or produce such action.

395 U.S. at 447. The rule in Brandenburg has its roots in a series of famous early twentieth century dissents by Justices Holmes and Brandeis.

In 1979 Judge Bork insisted that Brandenburg, and a similar decision in Hess v. Indiana, 414 U.S. 105 (1973), were incorrectly decided:

> Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment. Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule. Speech of that nature, moreover, poses obvious dangers. If it is allowed to proliferate and social or political crisis comes once more to the nation, so that there really is a likelihood of imminent lawless action, it will be too late for law. Aside from that possibility, it is well known that such speech has been and is used to recruit persons for underground activity, including espionage, and for terrorist activity. More dangerous is the lesson that our form of government is not inherently superior to any other. Like pornography, it is held to be a matter of taste. A nation which comes to believe nothing about its fundamental principles of organization is unlikely to show determination in defending them. It is unlikely to display high political morale or cohesiveness. It may not have a very high chance of survival either.[36]

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36 Speech, University of Michigan, February 5, 1979, pp.21-22.

On the second day of his confirmation hearing, Judge Bork assured the Judiciary Committee he believed that Brandenburg was correctly decided:

> [T]he Supreme Court has come to the Brandenburg position--which is okay; it is a good position--which is that you cannot be prosecuted for advocating violation of the law unless lawless action is imminent, or imminent lawless action may be caused. That is a good test, and it is very unlikely that the publication of a book advocating violation of the law would produce imminent lawless action.[37]

> Senator Leahy: Do you agree then, with the Brandenburg case?
>
> Judge Bork: Yes, I do.[38]

> [O]n the subject of speaking, advocating political disobedience or civil disobedience or advocating overthrow, I am about where the Supreme Court is.[39]

Senator Leahy noted that that testimony was inconsistent with Bork's prior position.[40]

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37 September 16, 1979, p.115.

38 Id. at 119.

39 Id. at 129.

40 Id. at 120, 121.

The next day Judge Bork testified that he believed Brandenburg was wrongly decided, but that he "accepted" it as a judge:

> Now, I have not changed my mind about what I said upon this subject. I could have accepted a First Amendment law that developed the way I thought in '71 it ought to have from the beginning. I could accept that.
>
> The law did not develop that way. It developed to require a closer nexus between the advocacy and the violent action or the lawless action, imminent lawless action. That is a change in the thing, but it does not involve me changing my mind at all. I can accept either position.
>
> I accept the fact that the Supreme Court has added an additional safeguard to the position that I took in 1971 for speech advocating lawlessness. As an academic, I thought that was not theoretically justified. As a judge, I accept it, and that is all there is to that.[41]
>
> Now, what I am simply saying is I am not sitting here today telling you that if I write an article again as a law professor that I would say Brandenburg is wonderful. All I am telling you is that as a judge I accept Brandenburg as the law.[42]
>
> All I am telling you is I now accept, as a judge, the position that the law has reached, and I have no desire to overturn it. I have no desire to whittle it away. But that does not mean that I have abandoned my original critique of those theories. I haven't even

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41 September 17, 1987, tr. p.37.

42 Id. at 208.

thought about them again, much less abandoned them.[43]

> I think our discussion of Brandenburg and clear and present danger demonstrates that I have not shifted from my writings. I have said that, as a judge, I accept those cases as precedence and will apply them. It's settled law. That's all I've said. I haven't said that these writings were wrong. I have said that I accept that body of precedent and will apply it. That's all I've said.[44]

Also that day Judge Bork stated he was undecided about whether Brandenburg was correctly decided:

> I am not sure, if I sat down and argued it theoretically I would not criticize Brandenburg again. But it is a settled position and I accept it.[45]

(6) Cohen v. California, 403 U.S. 15 (1971).

The Supreme Court in this case held that the First Amendment protected an individual from prosecution for wearing a jacket bearing a political slogan containing vulgar language. Justice Harlan, writing for the majority, explained that it would be impracticable for the courts to establish rules regarding which vulgar terms were constitutionally protected and which could be

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43 Id. at 216.

44 Id. at 219.

45 Id. at 197.

made the basis of a criminal conviction:

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgement below.

403 U.S. at 25.

In two 1985 speeches Judge Bork insisted that the answer to the Supreme Court's question was that each community should be permitted to decide which words were to be declared "obscene" and banned from public use:

> The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The Principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard of tort law is inherently boundless, for how is one to distinguish the reckless driver from the safe one. The answer in both cases is, by the common sense of the community.[46]

On the third day of his confirmation hearing, Judge Bork

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46 Speech, Aspen Institute, August 11-14, 1985, p.6; See also Speech, West Point, April 9, 1985, p.6.

assured the Judiciary Committee that he believed that even if a community had decided a word was "obscene," the Supreme Court could and should make its own decision as to whether the word involved was obscene as a matter of constitutional law:

> Now in order to make sure that the First Amendment is being complied with, when a State punishes words as obscenity... the Supreme Court has to look, or some court has to look and say, did the State correctly classify those words as obscenity or as fighting words under the constitutional standard? If the State did not, then the Supreme Court should reverse the conviction and say you may not punish that speech.
>
> But it is for the Supreme Court to define what is obscenity... and to ask in each case, Did the State correctly act against those words, or did it incorrectly act against words?
>
> I trust I make myself clear on this point, but I am not sure. All I am saying is the ultimate control of the definitions and categories of words must be in the Supreme Court, not in the State, if the First Amendment is to be upheld.[47]

On the fourth day of the hearings, Judge Bork insisted that, although he still objected to Cohen, he believed that the Supreme Court should not accept a community's judgment that a particular word is obscene:

> I stated, and I still state, that in order to protect the First Amendment guarantees of free speech, the Court has to define what

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47 September 17, 1987, tr. p.37.

88-375 O - 89 - 33

obscenity is and it may not allow a community to override that....

The question of whether this is an obscene word is, in the first instance, for the community. It must decide whether its obscenity law applies to this word. Then the Court must decide whether it is obscene within the meaning of the First Amendment case law. And if it is not obscene within the meaning of the First Amendment case law, then the speech is protected.

I have no problem with that. I have never said anything to the contrary.[48]

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48 September 18, 1987, tr. pp.284, 287.

EQUAL PROTECTION

(7) Sex Discrimination

For at least the last 14 years the Supreme Court has held that the Equal Protection Clause forbids discrimination on the basis of sex absent some significant governmental need to make some distinctions. In 1980 every member of the Supreme Court except Justice Rehnquist agreed that gender discrimination was unconstitutional except where it "serve[s] important governmental objectives and... the discriminatory means employed [are] substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Ins. Co., 466 U.S. 142, 150 (1980).

In 1971, Judge Bork asserted the only discrimination forbidden by the Equal Protection Clause was discrimination on the basis of race. "[C]ases of race discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the due process or equal protection clause."[49]

In a 1982 speech Judge Bork denounced the Supreme Court for "nationalization of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders

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49 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L.J. 1, 17 (1971).

belong."[50] He specifically objected that this approach had led the Court to extend the coverage of the Equal Protection Clause to groups other than racial minorities:

> It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them.[51]

In Judge Bork's view the constitutional doctrine that the state and federal governments may no longer deny to women the same fundamental rights accorded to men is a rule with no relationship to the principles of the Equal Protection Clause, but just the passing morality of the intellectual class.

In another 1982 speech Judge Bork argued that the Equal Protection Clause would be unworkable if extended to discrimination on any basis other than race and ethnicity:

> We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to other racial and ethnic groups and to religious groups. So for, it is possible for a judge to minimize

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50 Speech, Federalist Society, Yale University, April 24, 1982, pt.2, p.10.

51 Id. at 9.

subjectivity.

> But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases. Every group that loses in a legislative contest is, by definition, a "minority."[52]

In August, 1985, Judge Bork stated that the Fourteenth Amendment forbade only discrimination on the basis of race and ethnicity:

> In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a judge making up what more it's about. And I don't think he should.[53]

In June 1987 Judge Bork reiterated, "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."[54]

During his 1987 testimony, however, Judge Bork insisted that the Equal Protection Clause should be extended beyond discrimination on the basis of race, and repeatedly insisted that the Clause should be construed to forbid discrimination on the

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52 Speech, Catholic University, March 31, 1982, pp.18-19.

53 Tape Transcription, Speech, Aspen Institute, August 13, 1985.

54 Worldnet Interview, June 10, 1987, p.12.

basis of sex except in "extreme" or "rare" cases.[55] Judge Bork announced that in his view all forms of government discrimination were unconstitutional unless they had a "reasonable basis."[56] Under his reasonable basis test, Judge Bork explained, he would reach the same results that the Supreme Court had reached in virtually all of the recent sex discrimination cases decided by that Court.[57] Judge Bork insisted that he had only criticized the Supreme Court's sex discrimination cases to the extent that some of them had provided too little protection of sex discrimination:

> I have been teaching those cases in which they applied the equal protection clause to women before, and I have never criticized them, never complained about them. The only trouble with them is they applied the lowest scrutiny they could find, so that they had those ridiculously discriminatory statutes, which I criticized in class.[58]

Judge Bork's new reasonable basis test is equally at odds with his prior position. Contrary to Judge Bork's 1971 article, the reasonable basis test "construct[s] substantive individual rights under the... equal protection clause" in cases not

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55 September 17, 1987, tr. pp.27, 225-26.

56 September 15, 1987, tr. pp.139-40, 172-73, 210-12; September 16, 1987, tr. pp.73-74; September 17, 1987, tr. pp.27-37, 133-43, 222-26; September 18, 1987, tr. pp.58-60, 190-91, 195-204, 266.

57 September 17, 1987, tr. pp.28, 29, 35, 140, 224.

58 September 18, 1987, tr. p.266.

involving racial discrimination. Contrary to Judge Bork's 1982 position, the reasonable basis test "abandon[s]... a very tight analogy to race." Contrary to Judge Bork's June 1987 statement, the September 1987 reasonable basis test does not keep the Equal Protection Clause "to things like race and ethnicity." Under the new reasonable basis test, "Any person is covered. That means everybody is covered, men, women, everybody."[59] Judge Bork now insists that the Equal Protection Clause should be interpreted according to evolving standards and social mores about the role of women:

> As the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seemed outmoded stereotypes and they seem unreasonable and they get struck down. That is the way a reasonable basis case test should be applied.[60]

But in 1982 Judge Bork insisted that the courts were not competent to decide which legislative attitudes towards women were legitimate judgments, and which were outmoded stereotypes:

> There being no criteria available to the court, the identification of favored minorities will proceed according to current fads in sentimentality.... This involves the judge in deciding which motives for legislation are respectable and which are not, a denial of the majority's right to

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59 September 16, 1987, tr. pp.73-74.

60 September 15, 1987, tr. p.211.

> choose its own rationales.... It is not explained why courts are entitled to tell the legislature their moral judgments are really prejudices and that their perceptions of social reality are skewed.[61]

During his confirmation hearing Judge Bork insisted that he had long adhered to his reasonable basis standard:

> The Chairman: When did you adopt Justice Stevens' view?
>
> Judge Bork: I don't know, I --
>
> The Chairman: I never heard it until this --
>
> Judge Bork: Well, I haven't been writing about the equal protection clause.
>
> The Chairman: I know -- not necessarily in your writings; I mean, have you ever adopted it anywhere before? I mean, I've never heard it before.
>
> Judge Bork: It's not in writing, but, you know, we've discussed all these cases in class.[62]

Since Judge Bork ceased teaching at Yale in the fall of 1982, his conversion to the reasonable basis standard would have to have occurred no later than 1982. Judge Bork also insisted that he only argued that the Equal Protection Clause forbade only racial discrimination in the era prior to Supreme Court decisions extending the Clause to discrimination on the basis of sex:

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61 Speech, Catholic University, March 31, 1982, pp.18-19.

62 September 18, 1987, tr. pp.200-201.

> At the time when I wrote about the equal protection clause, the Court had never extended the clause to women.[63]

Since the extension of the Equal Protection Clause to women had clearly occurred by the time of Frontiero v. Richardson, 411 U.S. 677 (1973), Judge Bork would have had to have abandoned his original position no later than 1973. Neither of the quoted passages can readily be reconciled with what Judge Bork continued to say after 1973 and 1982.

(8) Goesaert v. Cleary, 335 U.S. 464 (1948).

In Goesaert the Supreme Court held that a state could refuse to license women as bartenders unless they were wives or daughters of male owners of licensed liquor establishments.

In 1971 Judge Bork asserted that Goesaert was correctly decided, and that the Supreme Court also should have sustained the different treatment of robbers and embezzlers in Skinner.

> The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a list of cases as improper and as intellectually empty

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63 September 15, 1987, tr. p.172.

> as Griswold v. Connecticut. Any casebook lists them, and the differing results cannot be explained on any other ground other than the Court's preference for particular values.
>
> Professor Wechsler notes that Justice Frankfurter expressed "disquietude that the line is very often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality.'" The line is not very thin; it is nonexistent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgement, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.[64]

On the third day of his confirmation hearing Judge Bork testified that he believed Goesaert was wrongly decided:

> In Goesaert v. Cleary, a case from 1948, the Court said that a State could refuse to license women as bartenders unless they are wives or daughters of male owners of licensed liquor establishments. That was upheld in Goesaert v. Cleary. That, too, is a ridiculous distinction and would fail under the reasonable basis test.[65]

Judge Bork asserted that the Supreme Court's "rational basis" standard was different and less stringent than his own; he described his 1971 article as criticizing the Court for providing

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64 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 11-12 (1971).

65 September 17, 1987, tr. p.29.

too little protection for women, and as critical of the decision in Goesaert:

> Senator Specter: If you use the reasonable means test, a rational basis, pretty much everything is stricken, then there is always something that can be conjured up as a rational basis?
>
> Judge Bork: No, no Senator. They did that, and I objected to it. I think I objected to it in the Indiana article, because they begin to imagine rational bases.
>
> For example, I cited the cases -- I cited critically in the Indiana article. They upheld the statute that said women couldn't be bartenders unless they were related to a male owner or proprietor of the bar. I thought that was a ridiculous distinction and I criticized it.[66]

(9) Skinner v. Oklahoma, 316 U.S. 535 (1942).

This decision struck down an Oklahoma statute that mandated surgical sterilization for any person convicted of three or more crimes "amounting to felonies involving moral turpitude." 316 U.S. at 536. Sterilization was neither required nor authorized if the felonies arose out of violation of "the prohibit[ion] laws, revenue acts, embezzlement, or political offenses." 316 U.S. at 537. The Supreme Court held that, because sterilization irrevocably destroyed a fundamental right, the courts should apply a "strict scrutiny" standard to any state imposing mandatory sterilization on a specific group of individuals. 316

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[66] September 17, 1987, tr. p.255.

U.S. 541-42.

In 1971, Judge Bork could see no constitutional objection to a law that sterilized pickpockets, but imposed no such penalty on white collar embezzlers or perpetrators of election fraud:

> All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, it to appeal to simplistic notions of "fairness" or what it regards as "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut. Any casebook lists them... Skinner v. Oklahoma...[67]

During his confirmation hearings, Judge Bork asserted that he objected only to the reasoning in Skinner, but agreed wholeheartedly with the result. Judge Bork offered two distinct reasons for upholding the result in Skinner. First, he stated, the law in Skinner would violate his "reasonable basis" test:

> In Skinner against Oklahoma, I think it might have been better to say that the statute does not have a reasonable basis because there is no scientific evidence upon which to rest the thought that criminality -- that was not then, I do not know anything about the state of scientific evidence now -- that

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67 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind.L.J. 1, 11-12 (1971).

> criminality is really genetically carried.[68]
>
> [I]f they merely used a reasonable basis test and ask whether the law had a reasonable basis, I think the statute in Skinner against Oklahoma, the sterilization statute, would have failed under a reasonable basis test.[69]

Second, Judge Bork advised the committee that he believed that the statute at issue was invalid because it was racially motivated:

> Justice Douglas did say something which is quite correct and he did not need to talk about procreation and fundamental rights to do it. That is, he noted that the statute made distinctions, for example, between a robber and an embezzler. The embezzler was not subject to this kind of thing.
>
> Had he gone on and pointed out that those distinctions really sterilized, in effect, blue collar criminals and exempted white collar criminals, and indeed, appeared to have some taint of a racial basis to it, he could have arrived at the same decision in what I would take to be a more legitimate fashion.[70]

> [The] most that I said in criticism in this article about Skinner v. Oklahoma was that the classification distinction made by the Court could not be squared with the other classification distinctions the court had made.... I really would not buy the way the Supreme Court there went about it, but I think it is clear -- people who have looked

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68 September 15, 1987, tr. p.138.

69 September 15, 1987, tr. p.140.

70 September 15, 1987, tr. pp.138-9.

at it more than I have say it is clear that that statute had racial animus in it, and it struck at, in effect, crimes that at that time were more likely to be committed by poor blacks than by middle-class white-collar whites. And on that ground the statue would be unconstitutional.[71]

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71 September 15, 1987, tr. p.55.

RIGHT TO PRIVACY

(10) Griswold v. Connecticut, 381 U.S. 479 (1965).

Griswold held unconstitutional a Connecticut law that made it a crime for a married couple to use any form of birth control, or for a physician to counsel or assist a married couple with regard to contraception. The majority opinion, written by Justice Douglas, held that married couples had a constitutional right to privacy, and that the Connecticut statute violated that right.

Judge Bork has repeatedly argued that Griswold was wrongly decided, and that the result in that case could not be reached in any legitimate manner. He wrote in 1971:

> The Court's Griswold opinion... and the array of concurring opinions... all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraception statute.... The truth is that the Court could not reach its result in Griswold through principle.[72]

In a 1982 speech Judge Bork reiterated that view:

> [T]he result [in Griswold could not] have been reached by proper interpretation of the Constitution and these [also citing Lochner v. New York and Roe v. Wade], of course, are only a very small fraction of the cases about

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72 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 8-9 (1971) (emphasis added).

criticized the reasoning offered by the Court:

> The Chairman: So... you suggest... that economic right has more or less constitutional protection than the right of a married couple to use or not use birth control in their bedroom. Is that what you are saying?
>
> Judge Bork: No, I am not entirely, but I will straighten it out. I was objecting to the way Justice Douglas, in that opinion, Griswold against Connecticut, derived this right. It may be possible to derive an objection to an anti-contraceptive statute in some other way. I do not know.[77]
>
> The Chairman: But you argue, as I understand it, that no such right [to privacy] exists.
>
> Judge Bork: No, Senator, that is what I tried to clarify. I argued that the way in which this unstructured, undefined right of privacy that Justice Douglas elaborated, that the way he did it did not prove its existence.[78]
>
> What I objected to was the way in which this right of privacy was created....[79]
>
> The Chairman: ...It seems to me, if you cannot find a rationale for the decision of the Griswold case, then all the succeeding cases are up for grabs.
>
> Judge Bork: I have never tried to find a rationale and I have not been offered one.

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77 September 15, 1987, tr. pp.129-30.

78 Id. at 131.

79 Id. at 134 (emphasis added).

which that could be said.[73]

Judge Bork also insisted that the very idea of a general constitutional right to privacy was inherently unworkable:

> We are left with no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future.[74]

> [T]hat right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.[75]

Judge Bork repeatedly denigrated Griswold and decisions applying it as "the sexual freedom cases" involving judicial "imposition of upper middle class, college educated, east-west coast morality."[76]

During the first day of his confirmation hearing, Judge Bork insisted on six different occasions that he did not necessarily disagree with the result in Griswold, and that he had only

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73 Speech, Catholic University, March 31, 1982, p.4 (emphasis added).

74 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 8-9 (1973).

75 "An Interview with Judge Robert H. Bork," Judicial Notice, v.3, no.4, p.9 (June 1986).

76 Speech, Federalist Society, Yale University, April 24, 1982, pt.2, pp.8-9.

Maybe somebody would offer me one.[80]

> The Chairman: ...And as I understand what you have said in the last 30 minutes, a State legislative body, a government, can, if it so chose, pass a law saying married couples cannot use birth control devices.
>
> Judge Bork: Senator, Mr. Chairman, I have not said that; I do not want to say that. What I am saying to you is that if that law is to be struck down, it will have to be done under better Constitutional argumentation than was present in the Griswold opinion.[81]

After Senator Biden observed that Judge Bork had insisted in 1971 and 1982 that he objected to the result as well as the reasoning of Griswold,[82] Judge Bork discontinued insisting that he disagreed only with the reasoning of that case.[83]

On the next day of the hearings, Judge Bork asserted that any conviction under the Connecticut statute would indeed have had to be overturned; not because of the reasoning in Griswold, but because the statute at issue had remained unenforced for years before Griswold was decided:

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80 Id. at 136.

81 Id. at 143.

82 Id. at 143-44.

83 See id. at 227 (Bork argues with Senator Hatch that there is "no warrant in the Constitution" for the decision in Griswold).

> [I]f the prosecutor brought such a case, I do not think any court would uphold a conviction, assuming that you could get a conviction. That law had not been enforced for so long--it is utterly antique statute; I do not think it was ever enforced--I think you would have a great argument of no fair warning, or sometimes a lawyers call--and I hate to use a word like this--desuetude, meaning it is just so out of date it has gone into limbo.
>
> So no prosecutor is going to bring that prosecution. If he did, the law would disappear and furthermore no court would uphold the prosecution. That is the fact.[84]

The next morning, the Judiciary Committee received a letter from one of the attorneys in Griswold explaining that the Connecticut statute at issue had indeed been enforced in the years prior to the decision in Griswold.[85]

On the third day of the hearing, Judge Bork testified that there might well be a constitutional right of marital privacy:

> The Chairman: [M]y question is putting aside all the specific amendments you have mentioned either now or during the past several days do you believe that the Constitution recognizes a marital right to privacy?
>
> Judge Bork: A marital right to privacy? I do not know. It may well. I have seen arguments to that effect, but I have never

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84 September 16, 1987, tr. p.49.

85 Letter to the Honorable Joseph Biden from Harriet F. Pilpel, September 16, 1987. The letter was read into the record on September 18, 1987, tr. pp.215-17.

> investigated that. It is certainly one that I entirely agree with. I mean, I agree with the concept, and I think it is very important that it be maintained.
>
> But I have never worked on a constitutional argument in that area.[86]

Finally, on the fourth day of the hearing, Judge Bork insisted he had merely objected to the reasoning of Griswold, that he had never expressed any hostility to privacy, and that convictions under the Connecticut law "might" have been invalid on the alternative ground that the public lacked fair warning that the statute at issue would be enforced.

> I have never written a word hostile to privacy. I have complained about the reasoning of one Supreme Court case.[87]

> If the statute in Griswold had ever been enforced against a married couple, or any couple, I think there might have been a very good chance it would be an invalid conviction because there is no fair warning. Nobody ever applied the law that way.[88]

(11) Roe v. Wade

During his confirmation hearing, Judge Bork testified that he objected only to the reasoning of the opinion in Roe v. Wade,

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86 September 17, 1987, tr. p.13.

87 September 18, 1987, tr. p.113.

88 Id. at 293.

410 U.S. 113 (1973), but not necessarily to the result. Judge Bork went further and suggested there were several possible theories on which the Supreme Court might protect a woman's right to have an abortion:

> [T]here may be some way to do it. I have heard fairly strong moral arguments for abortion, just as I have had fairly strong moral arguments against it. Whether those moral arguments could be rooted to the constitutional material, I really do not know.
>
> What I do unfortunately, I suppose, is take Supreme Court opinions that seem to me unsatisfactory as matters of constitutional reasoning and criticize them. And I have not gone back into the history and other things in an attempt to construct a new... right of privacy that has some other meaning. Maybe, as I say, one of the moral arguments would apply perhaps only to abortion because Griswold and Roe are quite different cases in quite different situations....
>
> [I]t would seem to me, Senator, that it would be easier to argue a right to an abortion. I am not saying it would work, but it would be easier to do that than it would be to find this generalized right of privacy. For example, I understand groups are working--I have not seen their work product, but I am told that groups are working on that. For example, some groups, I think, are trying an equal protection argument.
>
> Only women have this specific burden and forcing a woman to carry a baby to term--some of the groups are arguing, I suppose, is a form of gender discrimination. I have not seen that argument worked out, but I know it is being worked on.[89]

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89 September 16, 1987, tr. pp.158-61.

Prior to his nomination, however, Judge Bork repeatedly asserted that the result in Roe, not merely the reasoning of that decision, was wrong. In 1981 Judge Bork stated:

> Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.

In 1982 Judge Bork stated, in the prepared text of a speech given at Catholic University, that the decision in Roe "could not have been reached by interpretation of the Constitution."[90] In a 1984 interview, Judge Bork asserted, in criticizing the Supreme Court's decisions regarding abortion:

> I don't think its any of the court's business to intrude. I just don't think there was anything in the Constitution about it.[91]

(12) Meyer v. Nebraska, 262 U.S. 390 (1922).

This case dealt with a state law that made it a crime "to teach any subject to any person in any language other than the English language" in a public or parochial school, and forbade the teaching of a foreign language to any student who had not completed the eighth grade. The state prosecuted an instructor at the Zion Parochial School, a school affiliated with the Zion

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90 Speech, Catholic University, March 31, 1982, p.4.

91 "Robert Bork: In His Own Words," Washington Post, July 5, 1987 (quoting 1984 interview).

Evangelical Lutheran Congregation, because he had utilized in class "a collection of Biblical stories" in German. 262 U.S. at 397-98. The state argued that these prohibitions were needed to assure "that the English language should be and become the mother tongue of all children reared in this state." 262 U.S. at 401. The Supreme Court held the law unconstitutional, reasoning that the "liberty" protected by the Due Process Clause included a right to decide how to raise and educate one's children, 262 U.S. at 399-401.

In 1971 Judge Bork asserted that Meyer, like Griswold, was bad law:

> [S]ubstantive due process, revived by the Griswold case, is and always has been an improper doctrine.... This means that Griswold's antecedents were also wrongly decided, e.g., Meyer v. Nebraska, which struck down a statute forbidding the teaching of subjects in any language other than English....92

On the first day of his confirmation hearings, Judge Bork assured the committee:

> Meyer against Nebraska... which prohibited the teaching of children in a foreign language, could also be invalidated on an

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92 R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L.J. 1, 11 (1971) (emphasis added).

acceptable ground.[93]

On the third day of this confirmation hearings, Judge Bork stated:

> There was a statute in Meyer v. Nebraska which prohibit[ed] the teaching of students in a foreign language, and I said that statute could be invalidated on First Amendment grounds.[94]

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93 September 17, 1987, tr. p.78.

94 September 15, 1987, tr. p.244.

FREEDOM OF RELIGION

The Establishment Clause

(13) Framers' Intent

In speeches given in 1984 and 1985, Judge Bork argued that the established Supreme Court's three-part standard regarding the meaning of the Establishment Clause was inconsistent with the intent of the framers:

> The first part of the test--no religious purpose--appears to be inconsistent with the historical practice that suggests the intended meaning of the establishment clause. From the beginning, Presidents, at the request of Congress, have issued Thanksgiving Day proclamations that were explicitly religious. Jefferson alone refused. There were chaplains in the Continental Congress. The First Congress, under the Constitution proposed the first amendment four days after providing for a chaplain for each House. That Congress also enacted a law authorizing the President, "by and with the advice and consent of the Senate," to appoint a paid chaplain for the military establishment.
>
> These may seem relatively minor actions but, in the context of a federal government that had very few functions that might have touched upon matters of religion, they seem not so minor after all. There is other evidence that tends somewhat to bolster Robert L. Cord's claim that the first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way... if the three-part test does not accord with what we know of the framers' intentions with respect to specific practices, it probably does not accord with the general intention of the establishment clause....

> The best a judge can do is attempt to discern the core of the value the framers intended to guard and apply it to today's world. Fidelity to the historical clauses is particularly important in this most sensitive and emotional area of constitutional law.[95]

During his confirmation hearing, Judge Bork declined to express any view on the intent of the framers of the Establishment Clause, insisting he knew little about that issues:

> Senator DeConcini: [T]he establishment cases and establishment clause, can you give us some idea of what do you believe the Founding Fathers intended under this clause?
>
> Judge Bork: ....[I]n the first place, I do not know that much about the Framers' intentions in the area of the Establishment Clause...[96]

(14) Separation of Church and State

In his 1984 and 1985 speeches Judge Bork insisted that a certain intermingling of government and religion was desirable:

> Constitutional doctrine cannot separate either religion and law or religion and politics. As to the first, there is a very little law that does not rest ultimately upon moral choice and moral assumptions. that is inevitable. Most Americans believe that morality derives from religion. They will,

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95 Speech, University of Chicago, November 13, 1984, pp.5, 6, 16; See also Speech, Brookings Institution, September 12, 1985.

96 September 18, 1987, tr. pp.258-59.

> as they always have, continue to legislate on the basis of their moral-religious beliefs. More than that, clergy of various denominations will, as they always have, continue to proclaim what Christianity or Judaism requires of government policy.
>
> A relaxation of current rigidly secularist doctrine would in the first place permit some reintroduction of some religion into public schools and some greater religious symbolism in our public life.
>
> It is contended that such symbolism creates political divisiveness, and no doubt it does, but that argument assumes that it is only the presence and not the absence of religion that divides people. The deliberate and thorough-going exclusion of religion is seen as an affront and has itself become the cause of great divisiveness....
>
> What may finally be at stake are matters far beyond those a judge is permitted to contemplate in reaching a decision. The case for the absolute separation of religion and government is well known. It is that when religion and government merge, the individual is less free both in his faith and in his politics. Jefferson said that "religion is a matter which lies solely between a man and his God" and he approved what he called "a wall of separation between church and state." That is the individualistic view, but there is a communitarian view.
>
> There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them.[97]

During this confirmation hearing, Judge Bork's testimony on this same issues was as follows:

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97 Speech, University of Chicago, November 13, 1984, pp.13-17; See also Speech, Brookings Institute, September 12, 1985, pp.10-12.

> I think it is clearly important that religion and Government be kept out of each other, for the good of both religion and Government.[98]

(15) Taxpayer Standing: Flast v. Cohen, 392 U.S. 83 (1968).

Flast held that a federal taxpayer has, as a taxpayer, standing to challenge any federal expenditure that allegedly entails unconstitutional federal assistance to or support for religion. Under most circumstances no individual can challenge the constitutionality of a government act or program unless he or she has been injured by that program. Government federal assistance virtually never entails injuries of the sort ordinarily required to establish standing. Where government assistance to religion is involved, however, Flast permits the enforcement of the Establishment Clause by any taxpayer. The present Supreme Court unanimously adheres to Flast. Under Flast state taxpayers have standing to challenge allegedly unconstitutional state assistance to religious organizations. Grand Rapids School District v. Ball, 87 L.Ed. 2d 267, 274-75 n.3 (1985). See Valley Forge College v. Americans United, 454 U.S. 464 (1982).

In 1984 Judge Bork attacked the rule in Flast:

> The potency of the establishment [clause]

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98 September 18, 1987, tr. p.262.

rules has been immeasurably enhanced by another factor. In constitutional law philosophic shifts often occur through what appear to be mere tinkerings with technical doctrines. The doctrine in question here had to do with what lawyers call "standing." Persons alleging an interest only as citizens or taxpayers do not generally have standing to challenge constitutional violations in federal court. There must be some direct impact upon a person before he may maintain a legal action. That is true of every single clause of the Constitution from Article I to the Twenty-fifth Amendment -- except for the establishment clause. In 1968, in Flast v. Cohen, the Supreme Court created the rule that taxpayers could sue to enjoin the expenditure of federal funds under that clause. The Court did not explain why every other constitutional provision was left beyond the reach of taxpayer or citizen suits. This unexplained result is that the establishment clause is far easier to enforce than any other clause. Under it alone is an ideological interest sufficient to confer standing to sue.

Let me illustrate... the ideological nature of modern litigation under the clause by describing a case that is now before the Supreme Court.[99] In United States Department of Education v. Felton, the Court of Appeals for the Second Circuit, in a taxpayer suit, held violative of the establishment clause a New York City program, subsidized with federal funds, by which public school teachers who volunteered for the duty taught in private schools, including religious schools... The record contains no evidence that any teacher complained of interference by private school officials... In fact, the court, before striking the program down, described it as a program that apparently has done... little, if any, detectable harm."

This case illustrates the power of the revised standing concept to bring into court cases in which nobody could show a concrete

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99 The Supreme Court upheld the Second Circuit decision in this case. Aguilar v. Felton, 87 L.E. 2d 290 (1985).

harm..."[100]

On the third day of his confirmation hearing Judge Bork assured the Committee he agreed with the Supreme Court on standing issues:

> Senator Grassley: Judge Bork, we have heard a lot about the issue of standing, standing to sue in the Federal courts. Again, remembering the fact that I am not a lawyer, I would like to bring up a technical area that I want to explore with you in the doctrine of standing.
>
> I would like to just have you explain your views of this doctrine.
>
> Judge Bork: My views of this doctrine are almost identical with those of the Supreme Court... Now, I should say that my opinions on standing, as I have an analysis of them here by a professor you might all know -- he points out that my views on standing are almost identical to Lewis Powell's....[101]

> Senator Grassley: I have just one follow-up question on standing, and you related it to Powell, and then Senator Hatch just wanted a little bit of my time.
>
> We would not, then, based upon what you have just said and what you believe, we should not anticipate any major shifts on this issue if you were to replace Justice Powell?
>
> Judge Bork: No. I agree with the Court's

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100 Speech, University of Chicago, November 13, 1984, pp.2-4.

101 September 17, 1987, tr. pp.166-68.

line of rulings in recent years.[102]

(16) Free Exercise Clause

On November 13, 1984, Judge Bork argued that the Supreme Court's free exercise decisions had given the Clause "far greater breadth and severity" than was warranted by their text."[103] On September 12, 1985, Judge Bork suggested that the Supreme Court's interpretation of the Free Exercise Clause as "overly expansive."[104] On October 8, 1985, Judge Bork characterized these decisions as giving to the Free Exercise Clause "enormous breadth and severity."[105] Judge Bork twice suggested that the Free Exercise Clause be limited to government actions which was intended to punish religious activity:

> The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance.[106]

> The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance.[107]

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102 September 17, 1987, tr. p.169.

103 Speech, University of Chicago, November 13, 1984, p.2.

104 Speech, Brookings Institution, September 12, 1985, p.6.

105 Speech, Canisius College, October 8, 1985, p.3.

106 Speech, Brookings Institution, September 12, 1985, p.1.

107 Speech, University of Chicago, November 13, 1984, p.2.

If the Supreme Court were to accept Judge Bork's proposed standard, the court would be required to overrule virtually all of its Free Exercise cases of the last 30 years, since those decisions uniformly held that the Clause forbids government action, whatever its motivation, which unduly burdens religious activities. See, e.g., Thomas Review Board, 450 U.S. 707 (1981).

On the fifth day of his confirmation hearing, Judge Bork denied that he had objected to the Free Exercise decisions:

> On the establishment of free exercise clauses, I did not criticize those at all. All I said was -- and it was a common observation that has been made by law professors and justices -- is that they managed to get them in a position where they conflict with each other. And it just seems to me as a matter of doctrine that it would be nice if the two major clauses about religion did not conflict.[108]

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108 September 19, 1987, p.66.

OTHER INCONSISTENT STATEMENTS

(17) Incorporation Doctrine

The obligation of the states to obey the Bill of Rights derives from the constitutional doctrine, now half a century old, that most of the liberties guaranteed by the Bill of Rights are incorporated into the Due Process Clause. On June 10, 1987, Judge Bork expressed the view that the Supreme Court decisions establishing and applying the incorporation doctrine were inconsistent with the intent of the Framers:

> [T]he incorporation of the Bill of Rights, which originally applied only against the federal government [and] through the Fourteenth Amendment [applied] against the states, was probably a Supreme Court innovation which the ratifiers had not intended. It is by no means a bad development but a good development.[109]

In the spring of 1983, Judge Bork was a Distinguished Visitor at the University of South Carolina School of Law. According to a professor who participated with him in a faculty colloquium, Judge Bork:

> stated that in his view the fourteenth amendment was not intended to incorporate the guarantees of the various provisions of the bill of rights against the states. He explicitly stated that the first amendment's protection for freedom of speech and press should not have been held applicable to the states. He did add that he was not certain,

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[109] Worldnet Interview, June 10, 1987, pp.4-5.

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> though, whether those decisions should now be reversed and that it was in all events unlikely that they would be.[110]

Although Judge Bork thought the incorporation doctrine was good social policy, his suggestion that the doctrine was apparently contrary to original intent would, on the basis of his constitutional philosophy, have rendered the incorporation decisions illegitimate.

On the fourth day of his confirmation hearing, Judge Bork testified that the incorporation doctrine was probably correct:

> ...there has been more evidence which tends to show that incorporation was intended. It is very clear that Congressman Bingham, who wrote much of the clause and managed it in the House; and Senator Howard,... who was the member of the Committee that drafted it and was the floor manager in the Senate -- both of them clearly intended to incorporate not just the Bill of Rights, but any personal protection to be found in the... historical Constitution. So there is some pretty good historical evidence that it was intended.[111]

This is essentially the opposite of the position which Judge Bork took 3 months earlier during the Worldnet Interview.

In 1985 Judge Bork suggested that, if the incorporation

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110 Letter to the Honorable Joseph R. Biden from Professor William S. McAninch, September 21, 1987.

111 September 18, 1987, tr. p.4.

doctrine were wrong, the courts could adopt a modified doctrine which subjected the states to different constitutional requirements than apply to the federal government:

> If a judge decided that the incorporation doctrine was wrong -- and I'm not expressing an opinion about the doctrine itself -- if he decided it was wrong and wanted to undo parts of it, he would have to look at the particular instance to ask whether it was a rule that could easily be changed without doing any great damage or whether it was one such as the commerce clause, around which institutions had gathered and had relied upon and much of our national interest rested upon... Again, I'm not really saying anything, I'm really describing to you a kind of standard understanding. Justice Harlan, argued for applying the Bill of Rights and so forth in a different way to the states than it's applied to the Federal government, recognizing their different positions. In a way, he was suggesting a modification of incorporation doctrine. A lot of people have done that or suggested that and what the future of that is, I don't know.[112]

On the third day of his confirmation hearing Judge Bork testified that he believed the incorporation doctrine was too well established to be criticized:

> [S]ome things are absolutely settled within the law... [T]he incorporation doctrine is... These are things of not only long standing but all kinds of things have grown up around them. And judges understand that you don't

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[112] Unedited transcript of an interview with Judge Bork for California Lawyer Magazine, January 24, 1985, pp.6-7.

> tear these things up.[113]

This was the issue about which Judge Bork stated he was undecided in 1985.

Finally, on the last day of the hearings, Judge Bork stated:

> I have affirmed my full acceptance of... the incorporation doctrine.[114]

This was one of the instances in which Judge Bork insisted he "accepted as a judge" certain Supreme Court decisions, without necessarily agreeing with the substance of those new decisions.

(18) Cost of Civil Rights Statutes

In 1977-78 Judge Bork argued that the economic cost of civil rights legislation, like the cost of other social welfare measures, was excessive:

> Capitalism is imperilled because its ability to perform is being damaged by the enormous profusion of regulations imposed upon business. The motivations for that regulation are obvious. American business is an enormous creator of wealth, and the regulators want control of that wealth for their own purposes. They want to redistribute it in ways other than those a free economic system would do. They are

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113 September 17, 1987, tr. p.229.

114 September 19, 1987, tr. pp.102-03.

> assisted in that by the general notion abroad that the American corporate system is capable of absorbing almost any amount of burden and cost without diminishing its capacity or produce goods, services, and jobs.
>
> Though that is obviously false, the trend of legislation continues to place increasing burdens upon business in the name of a wide variety of social ends heavily freighted with the goal of redistribution -- environmentalism, consumerism, energy control, racial equality, safety and health, investor protection, small business welfare, and so on. Though each of these has much to be said for it, each has been overdone, and the costs are making business much less productive than before.[115]

On the fifth day of his confirmation hearing, Judge Bork asserted that he did not believe that civil rights measures as such had been overdone, but suggested only that to the aggregate effect of all federal regulatory measures might be excessive:

> Senator Specter: But I would invite your comment as to whether you can ever really conclude that it has been, quote, "over done," unquote, with respect to some of these values, especially the value of racial equality.
>
> Judge Bork: No. I have no feeling that that has been over done, Senator. I think what I was talking about there was that there may be a lot of regulation which is desirable in and of itself, but in the aggregate you may conceivably hamper business efficiency sufficiently that nobody will be better off because we will be a poorer nation.
>
> I think I had just seen a study by the Dean

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[115] Speech, Carlton College, 1977 or 1978, p.7 (emphasis added).

> of the business school which traced the decline in real constant dollars of shares of corporations--that is, the DOW should now be at around 4,000 or 5,000 if it had kept up with inflation. And I was just simply saying that that may suggest that the aggregate total regulation in the society may have damaged our efficiency and our ability to compete abroad and at home.[116]

(19) Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

The question at issue in this case, as in National League of Cities v. Usery, 426 U.S. 833 (1976), was whether the minimum wage provisions of the Fair Labor Standards Act could constitutionally be applied to state and local government employees. In Usery the Supreme Court held, by a 5 to 4 margin, that the statute, insofar as it applied to certain government workers, was unconstitutional because it infringed on the authority of the states to structure their internal operations and allocate their own resources. In Garcia the Court overruled Usery and upheld the application of the Fair Labor Standards Act to state and local government bodies. The Reagan Administration, it will be recalled, although responsible for enforcing the Act, denounced the decision in Garcia in particularly harsh terms.

In 1982, when Usery was still the law, Judge Bork announced that he agreed with the majority in Usery, expressing regret only that the Supreme Court did not go further in limiting the

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116 September 19, 1987, pp.58-59 (emphasis added).

authority of Congress:

> Despite my professional chagrin, I agree at least with the impulse that produced the result in National League of Cities v. Usery, the case which I lost, which was the invalidation of the amendment to the Fair Labor Standards Act that applied wages and hours provisions to the employees of state and local governments. But I doubt that the case has much generative potential. I doubt that it does more than express an impulse because there is no doctrinal foundation laid in the case for the protection of state rights or state powers...[117]

Garcia overruled Usery in 1985. In January 1986, Judge Bork reiterated his support for Usery, and argued that Usery had failed to survive because judges had not been sufficiently activist in attacking the authority of Congress to legislate in areas that affected state sovereignty:

> Looking back, it seems that National League of Cities v. Usery was correctly decided.[118]

Judge Bork apparently had no qualms about expressing these views at two Department of Justice conferences; both quoted passages were contained in the text of this prepared remarks.

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117 Speech, Federalist Society, Yale University, April 24, 1982, pt.1, pp.2-3.

118 Speech, Attorney General's Conference, January 24-26, 1986, pp.10-11, see also speech, Attorney General's Conference, June 14, 1986, pp.10-11.

On the second day of his confirmation hearing, Judge Bork testified he had no opinion about these two cases, and that he believed it would be improper to express to the Senate Judiciary Committee any views he might have had:

> Senator Grassley: Well, let me ask you this: Would you disagree with the Supreme Court 1985 decision in Garcia v. San Antonio?
>
> Judge Bork: Well, I should not speak to that, for two reasons. One is that I do not know, and two is I should not speak to it even if I did know... I really should not express an opinion on Garcia and National League of Cities out of propriety and also because I really have not got an opinion.[119]

(20) OCAW v. American Cyanamid.

In OCAW v. American Cyanamid, 741 F.2d 444 (D.C.Cir. 1984), Judge Bork wrote a decision which held that the Occupational Safety and Health Act permits an employee to require female employees, on pain of dismissal, to undergo voluntary sterilization. At his confirmation hearing Judge Bork testified that he had fund the decision a personally painful one:

> I think it was a wrenching case, a wrenching decision for [the women involved], a wrenching decision for us.[120]

Judge Bork's opinion in the case, however, states:

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119 September 16, 1987, tr. pp.101-02.

120 September 18, 1987, tr. p.138.

> Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.

741 F.2d at 445 (emphasis added).

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October 5, 1987

The Hon. Joseph R. Biden
Chairman
Senate Judiciary Committee
489 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

On several occasions during the hearings, members of the Committee inquired about the extent to which Judge Bork's criticisms of Supreme Court precedents might have occurred over many years in the past when he was a member of the faculty at Yale Law School. We enclose a table setting forth the most recent date on which Judge Bork has articulated his disagreement with each of the lines of precedent to which he has objected. The enclosed attachments are organized according to the numbered source.

We would be grateful if this material could be made part of the record.

Yours sincerely,

Elaine R. Jones/SYT

Elaine R. Jones

Eric Schnapper/SYT

Eric Schnapper

/vyt

Enclosure

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Most Recent Date
Of Bork Criticism
Of Supreme Court Constitutional Precedents

Case names are included where, in the statement at issue, or in earlier remarks, Judge Bork referred by name, or with a clear description, to the specific case with which he disagreed.

Date	Precedent Criticized
(1) June 10, 1987	Application of the Equal Protection Clause to discrimination on the basis of sex; Craig v. Boren 429 U.S. 190 (1970) (Worldnet Interview, p. 13)
June 10, 1987	Clear and present danger rule; Brandenburg v. Ohio, 395 U.S. 444 (1969) (Worldnet Interview, pp. 30-31)
June 10, 1987	One person, one vote; Reynolds v. Sims, 377 U.S. 533 (1964) (Worldnet Interview, pp. 22-23)
(2) June 14, 1986	Constitutionality of applying federal minimum wage law to states; Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Attorney General's Conference, June 14, 1986, p. 10)
June 14, 1986	Free speech protects advocacy of lawful conduct government regards as contrary to "public morality" (Attorney General's Conference, June 14, 1986, p. 8)

(3)	June, 1986	Right to privacy; Griswold v. Connecticut, 381 U.S. 479 (1965) ("An Interview with Judge Robert H. Bork," Judicial Notice, v. 3, no. 4, p. 9 (June 1986)
	June, 1986	Exclusion of illegally seized evidence; Mapp v. Ohio, 367 U.S. 643 (1961) ("An Interview with Judge Robert H. Bork," Judicial Notice, v. 3, No. 4, p. 6 (June 1986)
(4)	March 7, 1986	Constitutionality of Federal Election Campaign Act of 1974; Buckley v. Valeo, 424 U.S. 1 (1974) (Speech, Federalist Society, Stanford University, March 7, 1986, pp. 5-7)
(5)	September 12, 1985	Establishment Clause restrictions on government assistance to religion; Aguilar v. Felton, 87 L.Ed. 2d 290 (1985) (Speech, Brookings Institution, September 12, 1985)
	September 12, 1985	Scope of the Free Exercise Clause; Wisconsin v. Yoder, 406 U.S. 205 (1972) (Speech, Brookings Institution, September 12, 1985, pp. 1, 5-6)
(6)	August 13, 1985	First Amendment protects use of vulgar language; Cohen v. California, 403 U.S. 15 (1971) (Speech, Aspen, Colorado, August 13, 1985, p. 6)
(7)	1985	Poll tax is unconstitutional; Harper v. Virginia Board of Elections, 383 U.S. 603 (1966) (R. Bork, "Foreword", in G. McDowell, The Constitution and Contemporary Constitutional Theory, p. vii (1985))

(8)	November 13, 1984	Taxpayers have standing to challenge constitutionality of government aid to religion; Flast v. Cohen, 392 U.S. 83 (1968) (Speech, University of Chicago, November 13, 1984, pp. 2-4)
(9)	1984	Constitution protects right to have an abortion; Roe v. Wade, 410 U.S. 113 (1973) (Washington Post, July 5, 1987, quoting 1984 interview)
(10)	January 15, 1983	Constitutional rights of patients in government mental hospitals; Youngblood v. Romeo, 457 U.S. 307 (1982) (Speech, South Carolina Bar Association, January 15, 1983, p. 6)
	January 15, 1983	Due Process rights of public school students; Goss v. Lopez, 419 U.S. 565 (1975) (Speech, South Carolina Bar Association, January 15, 1983, p. 6)
(11)	March 31, 1982	Equal Protection Clause forbids discrimination against illegitimate children; Levy v. Louisiana, 391 U.S. 68 (1968) (Speech, Catholic University, March 31, 1982, pp. 17-19)
	March 31, 1982	Special constitutional scrutiny of laws disadvantaging minorities or interfering with the political process; United States v. Carolene Products Co., 304 U.S. 144 (1938) (Speech Catholic University, March 31, 1982, p. 17)
(12)	January, 1982	First Amendment protects art, fiction and other non-political speech unrelated to the democratic process (1982 Confirmation Hearing, pp. 4-5)

(13) 1981 — Constitutionality of 1965 and 1970 Voting Rights Acts; Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970) (Speech, Seventh Circuit, p. 5)

(14) February 5, 1979 — First Amendment protects publication of confidential information about state investigation; Landmark Communications, Inc. v. Virginia, 439 U.S. 829 (1978) (Speech, University of Michigan, February 5, 1979, p.10)

February 5, 1979 — First Amendment protects publication of name of deceased crime victim; Cox Broadcasting v. Cohen, 420 U.S. 469 (1975) (Speech, University of Michigan, February 5, 1979, pp. 9-10)

February 5, 1979 — State cannot declare obscene a work with serious literary, artistic, political or scientific value; Miller v. California, 413 U.S. 15 (1973) (Speech, University of Michigan, February 5, 1979, pp. 15-16)

(15) 1971 — Constitutional right to attend school teaching a foreign language; Meyer v. Nebraska, 262 U.S. 390 (1922) (R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1,11 (1971))

1971 — Fourteenth Amendment forbids state court enforcement of racial restrictive covenant; Shelley v. Kraemer, 334 U.S. 1 (1948) (R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L. J. 1, 15-16 (1971))

	1971	Constitution forbids mandatory sterilization of certain convicted felons; Skinner v. Oklahoma, 316 U.S. 535 (1942) (R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1,11-12 (1971))
	1971	State cannot establish durational residence requirement for welfare; Shapiro v. Thompson, 394 U.S. 618 (1969) (R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L. J. 1, 11-12 (1971))
(16)	December, 1968	State cannot establish state constitutional bar to enactment of civil rights laws; Reitman v. Mulkey, 387 U.S. 369 (1967) (R. Bork, "The Supreme Court Needs New Philosophy," Fortune, December, 1968, p. 166)

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GUEST: JUDGE ROBERT BORK, U.S. CIRCUIT COURT

TOPIC: BICENTENNIAL OF THE U.S. CONSTITUTION
(IN CONJUNCTION WITH THE GERMAN ASSOCIATION
OF AMERICAN STUDIES ANNUAL CONFERENCE)

HOST: JUDLYN LILLY

INTERACTIVE POSTS: BREMEN, FRG

ORIGINATION CITY: WASHINGTON, D.C.

DATE: JUNE 10, 1987

TIME: 9:00 A.M. - 10:00 A.M. EST

TRANSCRIBED BY:
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When the Supreme Court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that was a very -- that was to trivialize the Constitution and to spread it to areas it did not address.

Bussing? When I was in the government, I was solicitor-general. We took the position that there was nothing wrong with bussing, but it ought to be confined to rectifying the results of the constitutional violation and not to trying to produce social change that had nothing to do with the constitutional violation. That was the position I took back in 1976. I am not allowed to talk about a position I might take today.

PROFESSOR HELBISCH: Judge Bork, you mentioned the Commerce Clause a little earlier. You were talking about Brown a minute ago.

As a historian, I would like to ask a slightly different question than those asked before. I am returning to or appealing to your experience as a judge.

What I am concerned with is what makes the Supreme Court change its mind -- either (inaudible) versus Ferguson to Brown or -- say, in the thirties -- before and after the

where he says that the major function of the Supreme Court should be to make sure that this political process works; but otherwise, it should restrain itself from interfering with all these processes?

JUDGE BORK: I tend to agree with that statement of John Ealy's (phonetic) thesis, but I must say he derives a number of almost astounding conclusions from that thesis. I do agree that one of the Court's major functions is to prevent the defamation of the political process.

In Baker against Carr (phonetic), of course, the Court was looking at a state in which a majority could not reapportion the state legislature because malapportionment was so rife. I think the Court was right to step in. I wish it had followed the route that Justice Stewart laid out in the Colorado case -- Lucas against the General Assembly -- which is to say, "Show me that a majority can reapportion periodically, and I will approve almost any reasonable or rational result," which is to say "Just show me that the majority can reapportion."

I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American political history, American political theory, with anything

in the history or the structure or the language of the Constitution.

I think it would have been better if they had approached the problem not through the Equal Protection Clause, which presses you towards one man, one vote but rather through the guarantee clause, the guarantee of a republican form of government. Where the majority cannot control apportionment, a republican form of government is certainly in serious trouble.

QUESTION: May I just ask a point of information. When you say "majority," do you mean a majority of the legislators or a majority of the voters in the state?

JUDGE BORK: Of the electorate. The difficulty in Baker against Carr was that a large majority of the legislators where elected by a small minority of the state and they were not -- the legislature -- was not about to change that. So that the majority of the electorate was essentially helpless, unless the Court stepped in.

QUESTION: I would very much like to move to a somewhat different but related set of questions. When we talk about keeping the democratic process free and pure, a very important part in this is played by First Amendment freedoms

It is so indeterminate, and I agree with that. The difficulty is there is a clause that says to judges to do something about protecting speech. I don't think we can say -- we are not quite sure what they meant about that. In fact, we are very unsure about what they meant entirely about that. Therefore, we will abandon the clause.

That would be quite wrong. I think we ought to go through a process something like the one I described in order to give the clause form and value but not make it too broad.

QUESTION: I would like to continue discussing this particular set of questions. Do I understand rightly that you would abandon the clear and present danger concept developed by Judge Holmes or what would you replace it with?

Would it be any other formula or the Whitney formula of (inaudible) with the marketplace of ideas which also was linked to the cleared present danger, by the way. That would also then involve what you refer to as speech which may be carried on by groups which, however, we are not in the position to really create a series of clear and present dangers.

JUDGE BORK: Well, of course, the clear and present danger test has been abandoned here for some time with the

Brandenburg (phonetic) decision, at least the clear and present danger tests the way Holmes meant it, I think.

Actually, in those famous decisions, I thought the majority -- I think it was Sanford, Justice Sanford -- had a rather better logical argument than either Holmes or Brandison (phonetic). I don't think the clear and present danger test was an adequate test, no.

PROFESSOR HELBISCH: Another general question, let us say, and perhaps an impolite one.

Many of those contemporary (inaudible) have flawsibly said that the constitution overhold was meant to protect and privilege the well to do and to discipline and control the (inaudible). Now this has had a long history, debate one way or the other.

As a (inaudible) of the constitution in this year of celebration, would you say it is still the same as Beard (phonetic) and others have found it to be, basically? Would you say it has changed so much that it has become the contrary that it was (inaudible) or is it somewhere in between?

This question occurred to me somehow when I was re-reading Beard a little bit again. Then the slogans about Reagan bleeding the poor and helping the rich came up again

DOJ conference

FEDERALISM

It is somewhat daunting to be asked to speak on a topic such as federalism and discover later that the leading authorities in the field are scheduled at other sessions to cover every known aspect of that subject. Under those circumstances, the only way to avoid being repetitive is to be mistaken. You may judge for yourselves in a few minutes which of those I have regarded as the lesser evil.

The issue of federalism breaks into two parts. First, the judiciary's capacity to protect that feature of the Constitution from Congress and federal agencies. Second, the judiciary's capacity to restrain itself from undermining federalism through overly expansive interpretations of the Bill of Rights and the Civil War amendments. This latter problem is not usually thought of as implicating federalism but it is precisely a problem in federalism when the judiciary lays down national political and moral standards that override state and local standards.

The framers of our Constitution devised what Madison called a "compound system," one in which the national and state governments operated in different spheres. That was, of course, the meaning of the enumeration of powers in article I, reinforced by the tenth amendment. Federalism was also protected by the first eight amendments. The Bill of Rights,

people." The other is from Lord Devlin: "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives."

These are crucial matters. Any healthy society needs a view of itself as a political and moral community. Society reinforces and symbolizes its moral views with law. Traditional views are under attack from many quarters, and it does not help, in fact it hurts badly, that judges, whom Eugene Rostow once called "inevitably teachers in a vital national seminar," have sometimes chosen to teach the lesson that our attempts to define ourselves politically and morally through law are suspect, and often pernicious.

When the Constitution, honestly interpreted, does not speak to the contrary, communities should be allowed to have a public morality and to recognize that (if moral harms may be considered,) there is no such thing as a victimless crime. Judges tend to think the opposite. Thus, for example, the courts tend to assume that it is not a problem the community is permitted to address if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the "squeamish." The assumption (seems) ~~is plainly~~ wrong. The consequences of such "private" indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, tastes, and moral values inculcated do not stay behind in the theater.

The protection of federalism from national legislative power is more difficult. There are so many laws on the books, so many Supreme Court decisions upholding them, and the federal government is invclved in so many areas that a new, sharp-edged definition of national powers, such as commerce, taxing, and spending, would create chaos, politically, economically, and socially. In addition, the courts were never able to arrive at satisfactory definitions of those powers. To read the old commerce clause cases, for example, is to see the Court floundering with one unsatisfactory formula after another. It is perhaps time to think that can't be done and ask what the implications of that are. Does it mean that we must give up judicial protection of federalism?

It was this thought that for a time led me to think that we had passed the point of no return. I am no longer so sure, though what I am about to say is to be understood as tentative and, indeed, speculative. It occurred to me that with respect to other values we do not insist upon and certainly have not achieved hard theory and bright-line tests. The courts have attained nothing like that with respect to the speech clause of the first amendment. Nevertheless, they have not abdicated protection of that constitutional value.

Perhaps federalism can be protected in the same way. Looking back, it seems that National League of Cities v. Usery was correctly decided. Its weakness, which proved fatal, lay

JUDICIAL NOTICE

June 1986 VOL: III NO: 4

BQ 031 Original

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(A note to our readers: On September 5, 1985, Judicial Notice Editor Patrick B. McGuigan conducted a lengthy interview with Judge Robert H. Bork of the U.S. Circuit Court of Appeals for the District of Columbia Circuit. The interview was held in Bork's chambers at the U.S. Court House in the nation's capital. A little more than half of that interview was printed in the October 1985 issue of Conservative Digest, but space limitations prevented publication of the entire text. Convinced of the importance and timeliness of the interview even now, we are printing the entire text in this special issue of JN.

Bork is frequently mentioned, usually along with his colleague Antonin Scalia, as a potential nominee to the U.S. Supreme Court. Educated at the University of Chicago, he has been a distinguished professor at the Yale Law School, Solicitor General of the United States, acting U.S. Attorney General and has been a Circuit Judge since 1982. An excellent public speaker and a forceful writer, Bork has become a leading scholarly advocate for restrained judicial decision making.

In this interview, Bork discussed the "interpretivist" and "noninterpretivist" approaches to legal analysis, legal education and ideologies, criminal law, values in the law, the "privacy doctrine", limitation of court jurisdiction, libel law, standing, bureaucracies and liberty, and many other issues. In addition, he talked about his personal political philosophy, intellectual influences on his development as an attorney and writer, and the need for greater popular and intellectual understanding of this nation's founding documents. The text of the interview follows.)

AN INTERVIEW WITH JUDGE ROBERT H. BORK

--by Patrick B. McGuigan

Q: I am going to try to cover several areas and I want to start out with a general discussion of judicial and legal policy, and your philosophy on some of those things. First question: What is the proper role of judges in a democratic society?

Judicial Notice is a publication of the Institute for Government and Politics and its Judicial Reform Project. The Institute is a division of the Free Congress Research and Education Foundation, Inc., a 501(c)(3) tax exempt organization. 721 Second Street, N.E., Washington, D.C. 20002

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I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision. The majority opinion merely notes that there are a lot of guarantees in the Constitution which could be viewed as guarantees of aspects of privacy. As a matter of fact, that's a misnomer because a lot of them guarantee public action. But the opinion then says, since we have all these Amendments which can be viewed as guaranteeing particular rights of privacy, we can generalize and create a general right of privacy.

Of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.

Q: Well, my next question is, I think you have already answered it -- is this a legitimate expression of the intent of the framers?

A: Well, as I said years ago, I thought the privacy notion had little to do with the intent of the framers.

Q: I am now going to ask you a couple of questions about areas where some conservatives disagree with you. Many of us have pushed for "withdrawal" or significant restriction of federal court jurisdiction over certain controversial social issues, including abortion and busing, school prayer, and so forth. We have maintained that this power exists under Article III, Section 2, of the Constitution, which defines the Supreme Court's jurisdiction "with such Exceptions and under such Regulations as the Congress shall make." You have maintained, eloquently, that this power does not reach as far as many conservatives believe. Although none of the Court regulating measures appear likely to pass in the near future, the significance of the discussion and of the controversy is clear. Will you elaborate your views for our readers?

A: In the first place, I am quite clear that the Congress has the power to remove jurisdiction as it likes from district courts and courts of appeals. Those are courts that Congress need not have created, and I think it could remove all jurisdiction and leave us all sitting here until we died off. That would be constitutional. The problem really arises only with respect to the Supreme Court, which is created by the Constitution and given appellate jurisdiction by the Constitution.

Now, as to Article III, Section 2, which you point out has the exceptions clause. It says the courts shall have appellate jurisdiction with such exceptions and regulations as the Congress may make. The question then becomes whether that enables the Congress to remove entire categories of jurisdiction from the Supreme Court because it dislikes what the Court is doing. And I must confess, although I have given an answer to that in the past, it seems to me the answer is not entirely clear for the following reason: I am clear that the exceptions clause was never designed for a use like this. If you should only use a clause for the purposes for which it was designed, then you shouldn't use it for this purpose.

evolving standard. It moves with the society's new consensus about what is consistent with human dignity, what is too cruel, etc., etc."

And then they say that evolving standard has now reached the death penalty, and eliminates it. But it is not made clear why the standard should evolve.

Q: In the absence of a constitutional amendment?

A: That's right. Furthermore, if we do look to what society's current standards are, it is quite clear from the statutes on the books that society's current consensus favors use of the death penalty.

I am not discussing whether the death penalty is a good or a bad idea but only the different constitutional approaches to it.

Q: In the whole area of Fourth Amendment interpretation, namely the provisions protecting suspects from unreasonable searches and seizures, have the courts gone too far? Let me go on. In your opinion, in the case of U.S. v. Mount issued last March, you had a particularly succinct sentence, I thought:

> Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence.

That's pretty tough stuff, and my question is, is that view still a minority among the judiciary, or are things changing?

A: I think they may be changing, but I really can't speak for the judiciary because I don't know in general what most judges think. There appear to be two possible reasons for the exclusionary rule. One is to deter unconstitutional police behavior. It is still being debated whether or not the rule does do that.

The other reason sometimes given is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society. The only good argument really rests on the deterrence rationale, and it's time we examine that with great care to see how much deterrence we are getting and at what cost.

Q: In your 1976 speech entitled "Can Democratic Government Survive?" you contended that to many academics, "a sense of guilt had become as essential to good standing as proper manners used to be." Later in that speech you elaborated, "It takes confidence in your values to punish for crime, and yet punishment rates in the United States and all the western world

THE POLITICAL PROCESS & THE FIRST AMENDMENT

MARCH 7, 1986; 8:15 P.M.

PANELISTS: JUDGE ROBERT BORK
PROFESSOR LILLIAN BEVIER
MR. CHARLES COOPER
PROFESSOR GEOFFREY STONE
MODERATOR: DEAN JOHN HART ELY

DEAN JOHN HART ELY:

As you see from your program, there will be four speakers. I do what I'm told so I will introduce them in the order they appear on the program. Judge Robert Bork, Professor Lillian Bevier, Mr. Charles Cooper, and Professor Geoffrey Stone. The organizers advised me that they have told the participants that they have ten minutes each for their introductory remarks. It would be kind, particularly to Professor Stone, if people would make an attempt to adhere to that, so that he'll be able to last until he gets to speak. And also he's had a longer day than those of us who live here.

Our first speaker is Judge Bork, who has had an interesting and productive career, as you all know. He's been in a number of interesting places at interesting times. [laughter] I wasn't thinking so much of whatever might have caused that outburst; I was thinking particularly about the Yale Law School faculty in the late 60's to the mid-70's and

fevers of the larger society. Intellectual ~~fads that are taking place~~ tend to move, perhaps 20 years later, into constitutional law, and there's very little resistance from a theoretical structure of the law itself.

So it's almost inevitable in our current ~~deplorable~~ state of theory that the law should seem to follow the zeitgeist rather than any internal logic of its own. ~~And~~ of course the zeitgeist is not a single thing--the zeitgeist I'm talking about is primarily that of the intellectual classes which ~~have~~ a disproportionate influence upon constitutional developments. ~~And I think~~ that may be the reason that the First Amendment ~~often~~ seems more attentive to self-expression, ~~which is another way of saying the privatization of morality~~ and less to the preservation of free political processes. ~~Because I think those are currently the viewpoints of the academic and intellectual classes.~~

The law, ~~itself~~ I don't intend to spend much time talking about, ~~but~~ the Supreme Court I think has from time to ~~time suggested that it really is much tougher when it's protecting individual self expression, whether that be pornography or whether it's subversive advocacy or something else, than it is about preserving the central core, that is the freedom of political processes~~. Others on this panel know more about that than I do, but I was struck, for example, in Buckley v. Valeo at the almost ~~lighthearted~~ way

in which the Court allowed ~~really~~ heavy regulation of political speech, and particularly heavy regulation of political contributions, which it didn't seem to think important. ~~And~~ In fact it allowed limitations of individual contributions so low that many people ~~were~~ are effectively excluded from the political process. Anybody who ~~didn't~~ doesn't want it known--a university president, somebody of that sort--that he supported a particular side was really forbidden from contributing much ~~of anything~~ without having that exposed. ~~And~~ The political corruption rationale is ~~very odd and the Court is very soft on it, because~~ the amounts that are regulated are ~~so~~ far below anything that could be expected to result in purchasing anybody's vote on an issue. ~~And~~ indeed, the Court justified ~~what it did by saying it had to uphold regulations on contributions~~ on the theory ~~it had to~~ prevent the appearance of corruption, ~~which~~ is ~~an~~ odd ~~thing~~. If there are ~~some~~ people who are so suspicious that they think a contribution over $1000 ~~somehow does something to~~ Presidential candidate, we have allowed a very weak rationale to control ~~what is symbolic and important~~ political speech, ~~and~~ something akin to the heckler's veto if there are people ~~out there~~ who are suspicious, the speech or the political conduct can be regulated.

~~But in any event what I really wanted to say is that I think the Court has wavered in its devotion to the idea of free political processes. I think Buckley v. Vallejo was not~~

a major victory for those of us who think that--in fact it was a major defeat--for those of who think that political processes are the core of the First Amendment and should be left wide open. But indeed I think, if one looks at the academic world, one sees that strain of thought even more strongly. I don't know--I'm always of two minds about how important the academic world is. But they may be the future. And if the future of the law is in the hands of that group I think there is reason for worry. I would suppose that most, at least the most vociferous constitutional theorists in the First Amendment, area are probably advocating first, judicial deference to congressional regulation of the political process, and second, something we don't often think of exactly as interference with the political process, but it is--an expansive interpretation of the Bill of Rights and the creation of new rights not specified anywhere in the Bill of Rights. Those are also ways of interfering with the political process, in fact taking large subjects out of the political process in ways which the written Constitution, the historical Constitution, in no way justifies.

I wonder why the academic world is that way, and perhaps it's because--perhaps the democratic process is not as popular in the academic world as one might hope. Because today it seems to me there's a wider gulf between the attitudes of academics and of the general American public

BROOKINGS SPEECH
September 12, 1985

~~The subject of~~ religion and the law has become a national issue. But I will be talking about the subject from perspectives that have little or no bearing upon my performance as a judge. These are, rather, thoughts that seem interesting to me as a law professor and a citizen. ~~I will mention two of them.~~

~~The first is the extraordinary power and scope of the interpretations given the two clauses of the first amendment concerned with religion. The second is the recent upsurge in litigation.~~

The religious clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions. The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance. Instead both have been interpreted to give them far greater breadth and severity.

The Supreme Court has fashioned a three-part rule for the establishment clause: "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither

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advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." Those tests are obviously designed to erase all traces of religion in governmental action, to produce, as Richard John Neuhaus put it, a "public square naked of religious symbol and substance." And the modern law largely accomplishes that, except when the Court simply ignores the test, as it sometimes does. ~~And though the Justices cannot agree on the meaning of their three-part test so that in the words of Judge Scalia, before he was a judge and was still free to say such things, the law is "in a state of utter chaos and unpredictable change," the primary thrust of the law is as I have described it.~~

Let me illustrate the severity of the substantive rules ~~under the clause~~ by describing a case recently decided by the Supreme Court. In Aguilar v. Felton, the Supreme Court, ~~in a taxpayer suit~~, held violative of the establishment clause a New York City program, subsidized with federal funds, by which public school teachers who volunteered for the duty taught in private schools, including religious schools. The program offered remedial instruction to educationally deprived children in remedial reading, mathematics, and English as a second language. The teachers were accountable only to the public school system, used teaching materials selected by city employees and screened for religious content, and taught in rooms free of religious symbols or artifacts. They were

generally not members of the religious faith espoused by the schools to which they were assigned. The record contains no evidence that any such teacher has complained of interference by private school officials or had sought to teach or promote religion. In fact, the lower court, before striking the program down, described it as "a program that apparently has done much good and little, if any, detectable harm."

The Supreme Court did not dispute that the program passed two parts of the three-part test since it had a secular purpose and its primary effect was neither to advance nor inhibit religion. The program was held unconstitutional, however, on the theory that it might entangle religion and government. The State, in order to be sure that the subsidized teachers do not inculcate religion, must engage in some form of continuing surveillance, which constitutes impermissible entanglement.

This case illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy.

The point I want to make about these cases is an entirely unoriginal one. The three-part test is not useful in enforcing the values underlying the establishment clause. Time permits me to discuss only the first part of the test -- that governmental action is unconstitutional if it has a religious purpose. That cannot be squared with governmental actions that we know to be constitutional. I remember the day our court

heard en banc a challenge by atheists to the Houses of Congress paying salaries to chaplains. The judges and the lawyers for the atheists stood while the marshal opened court with the words: "God save the United States and this honorable court." The first part of the test -- no religious purpose -- appears to be inconsistent with the historical practice that suggests the intended meaning of the establishment clause. The Northwest Ordinance of 1789 allowed land grants for schools, including sectarian schools, on the ground that "religion, morality, and education" must be advanced. From the beginning, Presidents, at the request of Congress, have issued Thanksgiving Day proclamations that were explicitly religious. Jefferson alone refused. There were chaplains in the Continental Congress, and the First Congress, which proposed the first amendment four days earlier, provided for a chaplain for each House. That Congress also enacted a law authorizing the President, "by and with the advice and consent of the Senate," to appoint a paid chaplain for the military establishment. These may seem relatively minor actions but, in the context of a federal government that had very few functions that might have touched upon matters of religion, they seem not so minor after all.

(4) & p.7

There are difficulties with each part of the three-part test, which may explain why the Court from time to time simply drops the test altogether. That happened in Marsh v. Chambers,

→ The practice followed in Nebraska was, of course, quite traditional. [insert (A)]

where the Court upheld the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain who was paid by the State out of tax monies. The Court majority reasoned essentially from ~~the~~ this historical record that ~~I have cited to show~~ could not have been intended that the amendment ~~was not~~ intended to cover this practice. The Court was undoubtedly correct in that, but there is a broader lesson: if the three-part test does not accord with what we know of the framers' intentions with respect to specific practices, it probably does not accord with the general intention of the establishment clause.

The religious clauses today have an impact on government and on society far beyond any impact they had only forty or fifty years ago. How is one to account for the enormous potency of these clauses, a potency many observers think to have been unsuspected by the framers? The exceptional sweep of establishment clause doctrine has led some to conclude that there is an anti-religious animus pervading the evolution of law. But that seems by no means a necessary conclusion, since the Court has been almost equally assiduous in demanding religious freedom for individuals under the free exercise clause. That hardly bespeaks a hostility to religion. Indeed, the court sometimes demands special accommodations for religion under the free exercise clause that it would undoubtedly have struck down as a violation of the establishment clause if government had made the accommodation voluntarily. The clauses

have been brought into conflict or, in more polite language, tension because of what Justice Rehnquist calls "our overly expansive interpretation of both Clauses."

One is left, however, to account for this overly expansive interpretation of the two clauses. Perhaps it may be put down to the centralizing tendency some have observed in the Court. Perhaps it may be attributed to the tendency others have remarked of the Court to expand its own powers to govern by expanding the meaning of the prohibitory clauses it administers. Whether or not those propositions are true, it is possible to offer a third hypothesis based upon similar trends in constitutional doctrine elsewhere. One thinks of developments in free speech doctrine in which it has been held that government may not, for example, deal with obscenity and pornography except in the most extreme cases, because, as one opinion put it, one man's vulgarity is another man's lyric. One notes the rise of the so-called right to privacy cases, which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases. ~~All of~~ these trends~~, from interpretations of the religious clauses, to readings of the speech clause, to the privacy cases~~ share the common theme that morality is not usually the business of government but is instead primarily the concern of the individual. Whether or not so intended, these cases may be seen as representing the privatization of morality.

If that is correct, it may reflect an extra-constitutional intellectual tradition dating back at least to John Stuart Mill's On Liberty. This line of thought takes the position that an individual's liberty may not be infringed unless he causes harm to others. That formulation is obviously empty unless we know what counts as harm to others. Mill's position, essentially, was that material injury counted as harm but that moral or aesthetic injury does not. Thus, morality becomes a matter for the individual, not for democratic regulation. That stance would produce the trends in constitutional law that I have mentioned. In particular, it might help to explain the religious cases, since religion and morality are closely connected. Indeed, it appears to be a sociological fact that most Americans regard religion as the sole or primary basis for morality. One might expect, then, the privatization of religion by a stringent application of the establishment clause to keep the community, through government, from advancing or retarding religion, and an equally or almost as stringent application of the free exercise clause to permit the individual maximum freedom in his beliefs.

[The ~~second fact I mentioned is the~~ enormous contemporaneous stirring in this field of constitutional law. That is part, of course, of the more general agitation of the issue of the relationship of religion to politics and government. We are witnessing now, ~~perhaps, a resurgence in religion, but~~

certainly a resurgence in the political assertiveness of religion-based movements. ~~One of the catalysts for that seem to be the recent rise of political awareness and sophistication~~ among evangelical and fundamentalists Americans. This religious movement is said largely to have disappeared from the arena of public policy after the Scopes trial. Since then public policies have moved in directions evangelicals and fundamentalists, among others, do not like. They have organized politically and returned to the national public policy scene with fervor and with greatly increased sophistication. Their challenge to the secularism of our culture, now dominant in our constitutional law, has reenergized other religious groups, notably many Roman Catholics, to take stands demanding the return of religious values to our public life. These groups do not by any means agree on what religious values suggest for public policy but on some topics there may be a broad consensus among them. Among the things that very religious people are apt not to like is the privatization of morality and religion. That smacks too much of moral relativism. Hence, we observe such manifestations of opposition to the past trend of constitutional law as demands for school prayer, moments of silence, opposition to abortion and to pornography, financial aid to religious schools, and the like. This movement runs head on into the view that morality and religion are private

matters in which government must not become involved. In some part, then, it is the counter-movement of the religious, a movement which is both intellectual and religious, that can be expected to increase constitutional litigation around, among other things, the religious clauses of the first amendment.]

Many observers expected a major recasting of doctrine, but the Supreme Court this past term surprised them by adhering to the old tests. Eventually, however, we may see such a reformulation, not because I think the attitude of the Court will change, though of course it may, and not because of political pressures, but because, as observers of this area commonly remark, present doctrine is so unsatisfactory. (8) Courts can live with logical incoherence for extended periods of time. They have demonstrated that capacity in various fields of law. But sooner or later the paradoxes in which they are involved become so rich and so widely noted that they are likely to try again. The new doctrine that emerges may ultimately come to seem equally unsatisfactory. It may be safe to predict change. There is no reason to anticipate the resolution of all problems.

~~What, then, is at stake in the choice of legal doctrine to govern the relationship between church and state? It may be that there is both less and more than the advocates on both sides suppose.~~

(8) It has been suggested that the prayer struck down in Engel might become constitutionally permissible if the teacher were given no duties while the school board, with the children leaving the room rather than the other way around. Odd as it may seem, precedent supports the idea that the crucial issue is whether the activity [illegible]

Constitutional doctrine cannot separate either religion and law or religion and politics. As to the first, there is very little law that does not rest ultimately upon moral choice and moral assumptions. That is inevitable. Most Americans believe that morality derives from religion. They will, as they always have, continue to legislate on the basis of their moral-religious beliefs. More than that, clergy of various denominations will, as they always have, continue to proclaim what Christianity or Judaism requires of government policy. They will often be demonstrably wrong because great moral precepts do not translate easily into policy detail, and the clergy may or may not understand the reality -- often economic or technological or political -- which lies between the moral precept and the choice of wise action. Still, the participation of churches and of those who address politics in religious terms serves as a reminder that public policy ought always to be based upon, and held accountable to, morality and not simply upon interest group struggles. I do not suppose for a moment that raw interest cannot be dressed in religious and moral argument, but the requirement that interest wear the clothes of morality may alter outcomes and may confer a legitimacy on the process of policy formation that the naked struggle for material gain can never achieve.

A relaxation of current rigidly secularist doctrine would in the first place permit some sensible things to be done. Not

much would be endangered if a case like Aguilar went the other way and public school teachers permitted to teach remedial reading to that portion of educationally deprived children who attend religious schools. I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools and some greater religious symbolism in our public life.

It is contended that such symbolism creates political divisiveness, and no doubt it does, but that argument assumes that it is only the presence and not the enforced absence of religion that divides people. The deliberate and thorough-going exclusion of religion is seen as an effront and has become the cause of great devisiveness.

The subject at hand is endlessly complex and ought to be approached with flexibility and caution. In particular, we ought to be chary of formulating clear rules for every conceivable interaction of religion and government. It is a fact that the attempt to deal with a subject in a complex, nuanced way, mindful of all the subtleties and variations that do not lend themselves to the formulation of flat statements is regarded as a sign of maturity and wisdom everywhere but on the bench. There it is regarded as, if not injudicious, at least as unjudicial. The mark of the judge, apparently, is that he can reduce the most complex reality to a three-pronged test. Indeed, he can. And in so doing, he leaves out most of the reality, and distorts the rest.

The best a judge can do is attempt to discern the core of the value the framers intended to guard and apply it to today's world. Fidelity to the historical clauses is particularly important in this most sensitive and emotional area of constitutional law. The legitimacy of any decision, going either way, is much more likely to be recognized, however grudgingly, if we can honestly say, this is the meaning of the original compact by which our nation was created, and everyone -- religionists, non-religionists, and anti-religionists -- must live by it.

What may finally be at stake are matters far beyond those a judge is permitted to contemplate in reaching a decision. The case for the absolute separation of religion and government is well known. It is that when religion and government merge, the individual is less free both in his faith and in his politics. Jefferson said that "religion is a matter which lies solely between a man and his God" and he approved what he called "a wall of separation between church and State." That is the individualistic view, but there is a communitarian view.

There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them. Neuhaus makes the point by paraphrasing Spinoza, "transcendence abhors a vacuum." The public square will not remain naked. If religion departs, some

other principle -- perhaps political or racial -- will arrive. Again Neuhaus: "This is the cultural crisis -- and therefore the political and legal crisis -- of our society: the popularly accessible and vibrant belief systems and world views of our society are largely excluded from the public arena in which the decisions are made about how the society should be ordered . . . . Specifically with regard to law, there is nothing in store but a continuing and deepening crisis of legitimacy if courts persist in systematically ruling out of order the moral traditions in which Western law has developed and which bear, for the overwhelming majority of the American people, a living sense of right and wrong. The result, quite literally, is the outlawing of the basis of law."

Rejected standard version of what framers intended

Rel. point "tirade" in Jaffa case + Madison as "opportunist"
cited, not this argument → Robert Cord

Litton's — Chicago

Abuse in Senate

Even if intent of founders — impossible now — legislative
argument

Intent of framers — everything else in legislative

Europe = Jaffa ? — Dopes
Partisan

Desegregation ~~of schools~~ — 5 States w/ total churches

Privileges and Immunities

6

Justice & Society Seminar
Aspen, Colorado
August 13, 1985

Had I known that Dr. Mortimer Adler is going to speak to us next week on "The Crisis in Philosophy," I would have called this talk "The Crisis in American Law Caused by Philosophy." I do think that American law, particularly American constitutional law, is in a period of crisis, that it is in danger of losing the virtues proper to law, and that the situation may get much worse before it gets better -- if, indeed, it does get better. Legal culture is like culture generally. It is capable of degeneration as well as improvement, and there is no guarantee that tomorrow will be better than today.

The crisis is the increasing tendency to confuse moral philosophy with constitutional law. Ideas that are not part of the Constitution become fashionable morality and seep into constitutional rulings by osmosis. Some courts, including my own, reach decisions in no way justified by the historic Constitution in the belief that the Constitution may change as our moral views change. Perhaps even more worrisome, the idea that judges may make up law according to moral reasoning has suddenly become the very dominant view of the faculties of most of the leading law schools. There is a veritable torrent of literature appearing which urges judges on to greater adventures in policy making.

Speech
Aspen Institute for Humanistic Studies
Aspen, Colorado - Aug. 11-24, 1985

A state attempted to apply its obscenity statute to a public display of an obscene word. I will not repeat it, but the message the defendant wore on the back of his jacket into a courthouse suggested that the reader perform a most implausible physical act with the draft law. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard of tort law is inherently boundless, for how is one to distinguish the reckless driver from the safe one. The answer in both cases is, by the common sense of the community. Almost all judgments in the law are ones of degree, and the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms. Moral relativism was even more explicit in the majority opinion, however, for the Court observed, apparently thinking the observation decisive: "One man's vulgarity is another's lyric." On that ground, it is difficult to see how law on any subject can be permitted to exist. One man's larceny is another's distributive justice.

But the Court immediately went further, reducing the whole question to one of private preference, saying: "We think it is

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CONSTITUTIONAL COMMENTARIES

The Constitution and Contemporary Constitutional Theory

by

Gary L. McDowell
with a foreword by
Judge Robert Bork

CENTER FOR JUDICIAL STUDIES

orists will approve of that, if the opinions reach the approved results; it is what they are calling for. The scholars will be more than willing to fill the law reviews with the supporting moral argumentation the opinions neglect to supply. This should not prove too arduous a task, since many of the legal philosophers have already demonstrated that their systems can produce any conclusions congenial to them.

It is tempting to speculate on the reasons for the recent emergence of this philosophizing trend. It coincides, of course, with the enormous expansion of the professoriate after World War II. It is quite possible that law school faculties for the first time reached a critical size that enabled them to see themselves as a class independent of the bar and so to develop interests separate from those of the bar. Professors and practitioners do very different kinds of work, and they examine the law in very different ways. Since each group is self-selected, they are likely to have different attitudes about law and about what kinds of things are worth doing. It seems clear that the new philosophical mode served the interests of legal academicians in more ways than one. There had always been an aspect of defensiveness about law professors. They felt themselves regarded by the bar as slightly wimpish, the those-who-can, -do, those-who-can't, -teach syndrome, and by their faculty colleagues in other departments as teachers in a vocational school, something less than scholars and intellectuals. The non-interpretivist, philosophical style elevated law school professors above the mundane concerns of practitioners, for whom many legal academicians have developed an increasing disdain, and made them feel the equals, if not the superiors, of faculties in other departments. Philosophical constitutionalizing thus is an important weapon in the struggle for status.

None of this means that legal approaches that confer status upon legal academics are for that reason illegitimate. The law-and-economics movement, with which I feel much more in sympathy and which has provided important perspectives on law, also differentiates law professors from the bar and also finds a ready fit with non-legal academic scholarship. That discipline had the disadvantage, however, of providing insights and suggesting conclusions that many professors disliked for essentially political reasons. Law-and-philosophy, being less rigorous and more manipulable, could provide the "correct" insights.

It is a common observation that faculties have become more "liberal" in political and social outlook than the generality of Americans. The outlook of law professors is likely to be more egalitarian and morally permissive than the outlook of the electorate. This seems to have occurred at approximately the same time the Warren Court was moving the judiciary in the same direction. The legal professoriate thus found itself increasingly in sympathy with what judges were doing just at the time when the judiciary came under rising criticism from the public and from the political branches. There was, therefore, a need, or at least a temptation succumbed to, to defend the courts' results as legitimate constitutional adjudication.

There is no occasion here to rehearse all of the categories of controversial cases over the past thirty years. What is pertinent for present purposes is that the Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic Constitution or in terms of any other proferred basis for constitutional decisionmaking. I offer a single example. In *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), the Court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nonetheless, the Supreme Court held that Virginia's law violated the equal protection clause, saying little more than,

"Religion and the Law"

University of Chicago
November 13, 1984

When I accepted Allan Bloom's invitation to speak on the subject of religion and the law, I had no idea it was about to become a national issue. It has, since more, and that makes it worth saying at the outset that I will be talking about the subject from perspectives that have little or no bearing upon my performance as a judge. These are, rather, thoughts that seem interesting to me as a law professor and a citizen.

This is a field of constitutional law, with which I have had no great familiarity, but when I came to look at it, I was struck by two things. The first is the extraordinary power and scope of the interpretations given the two clauses of the first amendment concerned with religion. The second is the upsurge in litigation. The Supreme Court has taken an unusual number of religious cases and there may be indications that current doctrine is about to be recast. I will take these aspects up in order.

The religious clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one

or a few religions. The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance. Instead both have been interpreted to give them far greater breadth and severity.

The Supreme Court has fashioned a three-part rule for the establishment clause: "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with relgion." Those tests are obviously designed to erase all traces of religion in governmental action, to produce, as Richard John Neuhaus put it, a "public square naked of religious symbol and substance." And the modern law largely accomplishes that, except when the Court simply ignores the test, as it sometimes does. But though the Justices cannot agree on the meaning of their three-part test, so that In the words of Judge Scalia, uttered before he was a judge and was still free to say such things, the law is "in a state of utter chaos and unpredictable change," Nevertheless, the primary thrust of the law is as I have described it.

The potency of the establishment rules has been immeasurably enhanced by another factor. In constitutional law philosophic shifts often occur through what appear to be mere tinkerings with technical doctrines. The doctrine in question here had to do with what lawyers call "standing." Persons

alleging an interest only as citizens or taxpayers do not generally have standing to challenge constitutional violations in federal court. There must be some direct impact upon a person before he may maintain a legal action. That is true of every single clause of the Constitution from Article I to the twenty-fifth amendment -- except for the establishment clause. In 1968, in Flast v. Cohen, the Supreme Court created the rule that taxpayers could sue to enjoin the expenditure of federal funds under that clause. The Court did not explain why every other constitutional provision was left beyond the reach of taxpayer or citizen suits. The unexplained result is that the establishment clause is far easier to enforce than any other clause. Under it alone is an ideological interest sufficient to confer standing to sue.

Let me illustrate both the severity of the substantive rules and the ideological nature of modern litigation under the clause by describing a case that is now before the Supreme Court. In United States Department of Education v. Felton, the Court of Appeals for the Second Circuit, in a taxpayer suit, held violative of the establishment clause a New York City program, subsidized with federal funds, by which public school teachers who volunteered for the duty taught in private schools, including religious schools. The program offered [redacted] instruction to educationally deprived children in remedial reading, mathematics, and English as a second

apparently has done so much good and little, if any, detectable harm."

language. The teachers were accountable only to the public school system, used teaching materials selected by city employees and screened for religious content, and taught in rooms free of religious symbols or artifacts. They were generally not members of the religious faith espoused by the schools to which they were assigned. The record contains no evidence that any such teacher has complained of interference by private school officials or has sought to teach or promote religion. In fact, the court described it as "a program that

before striking the program down

The Second Circuit did not dispute that the program passed two parts of the three-part test since it had a secular purpose and its primary effect was neither to advance nor inhibit religion. The program was held unconstitutional, however, on the theory that it might entangle religion and government. The State, in order to be sure that the subsidized teachers do not inculcate religion, must engage in some form of continuing surveillance, which constitutes impermissible entanglement.

This case illustrates the power of the revised standing concept to bring into court cases in which nobody could show a concrete harm and the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy.

The point I want to make about these cases is an entirely unoriginal one. It is that the three-part test developed for the establishment clause is not useful in enforcing the values

over. I guess one day they dropped this whole wad of telegrams on my desk, you know. It was pretty intimidating. Benedict Arnold. Judas Iscariot and so forth and so on. There were letters of support, too. I expected that because the night I did it, I knew it was big trouble.

JUDICIAL PHILOSOPHY

I think a judge is not an elected figure and his only mandate in this area is the Constitution. It's the only thing that gives him the right to govern. And if he begins to make up things that are not in the Constitution, he is governing, in a sense, without being elected and without being accountable.

We're talking, after all, [about] a judge saying to a majority of the representatives of the people, "You can't do that," and I don't think he should say you can't do that unless he's got some law. 'Cause otherwise he's just making himself the supreme governor of the society.

ABORTION

I don't think it's any of the court's business to intrude. I just didn't think there was anything in the Constitution about it.

DEATH PENALTY

I never really thought there was any legitimate way you could hold the death penalty unconstitutional when the Constitution itself mentions it a couple of times and assumes it will be applied. It is in the Fifth Amendment, it is in the 14th Amendment and so on.

Q: *Did you have any personal views on the death penalty itself?*

A: Well, pro, but not fanatically so. There are certain kinds of crimes occasionally in which one thinks the only possible penalty is death because the crime itself is so horrible. But I think the thing that concerned me most was [the] statistical evidence that the penalty deters. Now, there is argument about that evidence and I'm not enough of a statistician to be able to join in the argument, but it makes sense.

We know that imposing costs deters conduct. And if it deters, then you're saving the lives of innocent people. I find it a little hard to have a moral objection to executing a convicted murderer if the failure to execute him condemns, say, four or five, seven other people who are innocent, to death.

ORAL ARGUMENT

It's a lot of fun. I even enjoy it now. Because the questions are coming hither and yon and some are very penetrating questions. Some of them are not. And your mind is working very quickly. Closest experience to it is teaching a very large and lively class in a law school, when the students are arguing with you and you are getting questions and challenges from all over the classroom. And that's an exhilarating experience.

I know the Supreme Court has changed its mind during oral argument, because they've told me. And I know for a fact that I've changed my mind repeatedly during an oral argument, as a judge. I think the tendency in our system for the oral argument to disappear is a very unhappy one.

It is true, there are some lawyers who get up and have nothing to tell you except to repeat the brief. Sometimes you'll see a noted figure get up and make a terrible argument. And then some kid will show up from Iowa or someplace with a strange case and do a beautiful job—never been to the Supreme Court before.

TALKING TO NIXON ABOUT BECOMING SOLICITOR GENERAL

We chatted and Nixon gave me a discussion, quite lengthy, about what he viewed as the proper function of a judge and what judges shouldn't do. And it was pretty good. I mean, you know, I thought some professors I knew could do better, but I think for a busy president to sit down at Camp David, it was a damn good talk. He was a very bright man, a very bright man. It was essentially [that] he was essentially unhappy with the activism of the Warren Court, getting things out of the Constitution that aren't there and so forth.

My wife and I are delighted to be with you this afternoon. This is Mary Ellen's first trip to your state and she loves it. I have pointed out to her that the state is not all like Charleston. My first trip, some years ago, was to Parris Island, a place somewhat lacking in southern charm. Instead of Spanish moss and magnolias, it specialized, as I recall, in sand fleas and homicidal sergeahts. This is a distinct improvement.

We want to thank you for the enormous hospitality shown us by the South Carolina bar. We have been given a guided tour of the historic sites of Charleston that has been sheer delight. But, though we are grateful, we are not really surprised by such kindness. I have begun teaching a seminar at the law school in Columbia and have experienced the same extraordinary kindness and consideration.

The question arises how I can repay you. You may think I should do it in this talk but there is a problem about that. In my brief tenure as a federal judge I have learned that a judge is forbidden to say anything more interesting than "affirmed" or reversed." That is a lesson that the newspapers teach a judge the hard way.

Not too long ago, I made some extemporaneous remarks to students at Yale about constitutional law. These were the mildest of remarks -- things I had been saying for twenty years as a professor without arousing any discernible interest beyond the walls of the classroom and sometimes not even within the walls of the classroom. But now my remarks were reported

South Carolina Bar Association speech

10 Speech South Carolina Bar Columbia, S.C. - Jan. 15, 1983

The second source is Congress and the agencies it has created. We have become a regulatory-welfare state and that — despite attempts at deregulation — is unlikely to change substantially.

And, it must be admitted, the third source lies in the federal courts. With a degree of adventurism — some might call it imperialism — unknown until thirty years ago, federal courts have found in the Constitution a warrant for thrusting themselves into areas of life that this nation had always supposed properly governed by elected officials, States, municipalities, the states and individual citizens. Unless this State [illegible]

The results of all this have been horrendous not least for the judicial system.

CATHOLIC UNIVERSITY SPEECH

March 31, 1982

Eleven years ago I began a talk on the subject of judicial review by saying that "A persistently disturbing aspect of constitutional law is its lack of theory ... even [in] scholarly discussion of the subject."

No one would make that complaint today. We have a surfeit of stern young constitutional theorists, each of whom, to judge from the torrent of publications, spends all of his waking hours writing refutations of the others. In some ways this academic disputation, with its convolutions, refinements, and logic chopping reminds one of theological controversy that has gotten out of hand. It is said that some centuries ago there was a collection of Jewish scholars in North Africa which considered the question, If God truly loved man, would He have created him? After forty years of erudite and intricate debate, it was generally acknowledged that the answer was inconclusive.

I think that is not the case here. My excuse for returning once more to this intellectual melee is that it is important not only theoretically but politically and practically. How courts are to behave in applying the Constitution -- whether they are limited to interpreting the document or may properly introduce new values and create new rights -- goes to the question of whether the power of the judiciary is now partly illegitimate. The dispute has moved out of the academy into Congress, the executive branch,

BQ 004

Robert Bork: In His Own Words

Watergate, Abortion, Judicial Philosophy and Richard Nixon

In a series of 1984 interviews with Washington Post staff writers Al Kamen and Fred Barbash, U.S. Court of Appeals Judge Robert H. Bork talked about his career and judicial philosophy on condition that the material not be published unless he was nominated to the Supreme Court. President Reagan nominated Bork last week to succeed retiring Justice Lewis F. Powell Jr.

The excerpts begin with Bork talking about the 1973 "Saturday Night Massacre," when he carried out President Nixon's order to fire Watergate Special Prosecutor Archibald Cox. The task fell to Bork as the Nixon administration's solicitor general after then-Attorney General Elliot Richardson and then-Deputy Attorney General William Ruckelshaus refused to fire Cox and resigned.

Q: *How did you hear about it?*

A: Elliot's secretary put her head in the door and said, "The attorney general wants to see you." And that's when it started.

Q: *You knew what it was about.*

A: Well I assumed so, but I had no idea what my involvement was going to be. Ruckelshaus was there and a couple of Elliot's aides. And we talked about what was going to happen.

He was under pressure from the White House to fire Cox and so forth and so forth and finally he said, "I can't fire Cox." And he couldn't. I knew he couldn't. Not with the promises he'd made. "Can you fire him, Bill?" And that was the first time I thought. . . . I said, "Wait a minute." I didn't see it coming. Bill thought a minute and said no.

He said, "Can you fire him, Bob?" There was nobody behind me. So I said, "Wait a minute, let me think." And I began walking around Elliott's office while he and Ruckelshaus and the other guys kept talking about something else, and then finally I said, "Yeah I can, but I'll resign. I'll fire him and resign."

And he said, "Why would you do that? Why would you resign?" And I said, "I don't want to look like an apparatchik." He said, "No, you've got to stay. The department needs continuity."

Anyway, nothing was really decided and the whole afternoon went on this way. He went over to the White House and came back and Bill and I weren't sure what he was going to do, and I talked to Ruckelshaus about it, about the difference in our respective positions morally. Because they had made representations and so on [about not firing Cox].

And then finally he came back and said, "You've got to do it, carry it off." And I called my wife and told her what I had to do.

Q: *Who was behind you in seniority?*

A: There's a department regulation that says in the absence of the attorney general and his deputy, in the absence of both—the solicitor general [is in line]. And there's nobody else.

Q: *In hindsight you have no doubt that you did the right thing?*

A: No, I don't.

Q: *And do you feel that after that happened there was a time in which you were identified almost as the villain in some people's eyes?*

A: Sure, sure.

Q: *How do you feel about that?*

A: I think the one thing I should have done, and I didn't do because I was really not acclimated to Washington, I think I should have walked out of the White House that night, held a press conference instantly and said, "Don't worry, the investigation is going on as before."

Q: *How did you feel about that? Did anybody ask you to stop the investigation?*

A: No, I wouldn't have done it, you know. It was essential to me that none of that happen because I'm not going to be involved in an obstruction of justice. It seemed to me essential, that if I was to make it plain why I did it and that it was a moral thing to do, I had to be sure that the investigation did not stop and that they weren't hindered in any way.

Q: *You became a household word, and you suddenly became a famous person outside of the narrow circles in which. . . . Did that change your life in any way? I mean your family? Your wife?*

A: Well she was quite nervous for a while, needless to say. There was a lot of abuse.

Q: *What kind of abuse? In the press and so on?*

A: Well, some of that, but also a lot of mail and phone calls and so forth.

Q: *To your home?*

A: Well, I was listed. I was in the phone book and people were calling from all

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Wash. P 7/5/87

But there is something left, Ely contends, and that something turns out to be the ideas expressed in the famous footnote four to Justice Stone's 1938 opinion for the Supreme Court in United States v. Carolene Products Co. There, as most of you know, Stone reserved two questions in a suggestive way. In the case itself, the Court upheld an economic regulation with the lightest of scrutiny. The footnote reserves the question of the degree of scrutiny appropriate to two classes of cases.

> First. Review of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. . .", and,
>
> Second. Review of statutes where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . ."

One might be excused for thinking that in the First Amendment the Court had all the authority necessary to protect political processes and in the Fourteenth all that is needed to protect racial and ethnic minorities. But it is clear the footnote means more than these things and, to the degree it does, it necessarily involves judges in subjective and arbitrary constitutional adjudication.

My point may be sufficiently made through an examinati of the suggestion of special judicial solicitude because of "prejudice against discrete and insular minorities."

That sounds relatively bland, but in fact it is not and the application of the idea of "prejudice against discrete and insular minorities" has led, and inevitably so, to vastly incre judicial subjectivity and power at the expense of political democracy. We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to othe racial and ethnic groups and to religious groups. So far, it is possible for a judge to minimize subjectivity.

But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases. Every group that loses in a legislative contest is, by definition, a "minority." Courts cannot protect all minorities against legislative losses for that would turn the democratic process upside down. How does a judge decide that a particular minority's loss was due to "prejudice" and that they are "discrete and insular" so that they are unlikely to win enough of the time?

He must identify from among all those who have lost in the legislature which are the preferred minorities. To say that "prejudice" has made a minority "discrete and insular" is to make the ultimate value judgment that this is a group which should not have lost but should have won in the democratic process. That

is a flat replacement of democratic choice with judicial choice. There being no criteria available to the court, the identification of favored minorities will proceed according to current fads in sentimentality.

The judge must next ask whether the majoritiy's rationale for the disability imposed is adequate. This involves the judge in deciding which motives for legislation are respectable and which are not, a denial of the majority's right to choose its own rationales. There is no warrant in the Constitution for a judiciary that assumes a general power to specify to democratic government which ends it may seek and which not. Nor is there any guide anywhere outside of the Framers' checklist embodied in the document that gives judges a list of approved and disapproved ends of democratic government. Professor Ely himself demonstrated that all of the sources usually suggested are wholly inadequate.

He suggests, however, that courts provide particularly strict scrutiny when the losing group is not, in the characteristics relevant to the legislation, like the typical legislator because then inaccurate and unfair stereotyping may have occurred. But once more it is not explained why courts are entitled to tell the legislature their moral judgments are really prejudices and that their perceptions of social reality are skewed. And, as Ely describes the consequences, it turns out that courts should lift the disabilities imposed by legislation upon aliens, illegitimates, homosexuals, perhaps the poor, to some degree women, and he even

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES

JANUARY 27; FEBRUARY 12, 26; AND MARCH 11, 24, 31, 1982

Serial No. J-97-52

PART 3

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1982

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TESTIMONY OF ROBERT H. BORK, NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

The CHAIRMAN. Do you have a prepared statement?

Mr. BORK. No, I do not, Mr. Chairman.

The CHAIRMAN. I believe you were born in Pittsburgh, and your legal residence is here in the District of Columbia. You have three children, I believe, Mr. Bork.

Mr. BORK. That is correct.

The CHAIRMAN. You attended the University of Pittsburgh and graduated from the University of Chicago, I believe, with a B.A., and a J.D., also from the University of Chicago.

You were in the service from 1945 to 1946 and then from 1950 to 1952 in the Marine Corps.

Mr. BORK. That is correct.

The CHAIRMAN. Why did you leave in 1946 and then go back, or were you called back the second time?

Mr. BORK. I enlisted in the Reserves while I was in college, after I got out the first time, and they called up the Reserves in the Korean war.

The CHAIRMAN. Then you have had various experience here. I believe from 1977 to 1981 you were Chancellor Kent professor of law at Yale Law School.

Mr. BORK. Yes, Mr. Chairman. I actually became the Alexander M. Bickel Professor of Public Law.

The CHAIRMAN. The Alexander Bickel Professor of Public Law, 1979 to 1981. You are now with Kirkland & Ellis, a law firm here in the District.

Mr. BORK. That is correct.

The CHAIRMAN. Mr. Bork, you are a very widely respected legal scholar in the field of antitrust and constitutional law, I believe. Your numerous, informative writings and books are scrutinized by both students and professors of the law.

One such article which appeared in the 1971 Indiana Law Journal entitled "Neutral Principles and Some First Amendment Problems," contains statements which have caused some individuals to suggest that you may feel that the first amendment protects only speech which is explicitly political. Will you discuss this article, and in particular give your response to the charge of limiting first amendment protection to political speech?

Mr. BORK. Of course, to begin with, Senator, the first amendment protects the free exercise of religion and the freedom of the press as well as speech. Within the speech area, I was dealing with an application of Prof. Herbert Wechsler's concept of neutral principles, which is quite a famous concept in academic debate. I was engaged in an academic exercise in the application of those principles, a theoretical argument, which I think is what professors are expected to do.

It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested. On the other hand, while political speech is the core of the amendment, the first amendment, the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative

function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971.

The CHAIRMAN. Mr. Bork, in your book, "The Antitrust Paradox," you stated that the only goal that should guide interpretation of the antitrust laws is the welfare of consumers. While consumers' welfare is certainly one of the concerns that Congress had in enacting the antitrust laws, other concerns such as preserving competition and maintaining the viability of small business have played a role in formulating antitrust policy. Would you please comment on the validity of these other goals?

Mr. BORK. Well, I think, Senator, that we desire competition—which is one of the other goals you have mentioned—primarily because competition does benefit consumers. Therefore, I think when you say "protect competition" you are talking about protecting consumers.

The antitrust laws do, of course, in many of their aspects protect the viability of small business but in general we do not protect the viability of small business at the expense of consumers in the antitrust field. For example, price fixing might benefit some small businesses. On the other hand, there is a per se rule against it and that is because, when there is a conflict in the antitrust laws, in general we protect competition and consumers rather than small business.

The CHAIRMAN. Mr. Bork, your book is highly critical of a number of Supreme Court antitrust cases, and you have urged rejection of prohibitions against such traditional antitrust violations as tie-in arrangements, exclusive dealing, predatory price cutting, and price discrimination.

If you are confirmed as a judge of the Court of Appeals, would you feel yourself obliged to follow Supreme Court precedent even though you may greatly disagree with its application in a particular case?

Mr. BORK. Mr. Chairman, it seems to me that a lower court judge owes a duty of absolute obedience to Supreme Court precedent. If that were not true, the legal system would fall into chaos, so that my personal views certainly cannot affect my duty to apply the law as the Supreme Court has framed it.

The CHAIRMAN. Mr. Bork, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and how do you feel about judicial activism?

Mr. BORK. Mr. Chairman, I think what we are driving at is something that I prefer to call judicial imperialism.

The CHAIRMAN. Imperialism?

Mr. BORK. Imperialism, because I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone too far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government that we have.

The CHAIRMAN. Mr. Bork, how do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge?

(Sue just, anyhow, ... going to be funny. I am not going to be funny. The speech is to be an exercise in speech = Fodor Doctorate, to light literature,

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The subject I want to discuss this evening is a rather morbid one. My subject is the most recent embroilment of the federal judiciary in national politics.

As we all know, there is a strong effort being made in Congress, initiated by some conservative leaders, to undo the results of very unpopular court rulings and to prevent others that may be in the offering. Federal courts are to be denied jurisdiction in cases involving abortion, school busing, school prayer, and the male-only draft registration. There is also considerable force behind Senate Bill 158 which would attempt to reverse Roe v. Wade by defining human life as beginning at conception so that the due process protection of human life in the fourteenth amendment would effectively prohibit abortions. If this legislation should succeed, there would undoubtedly be more of a similar nature.

The movement is by no means insignificant. Last year a similar bill passed the Senate and missed only narrowly coming to a vote in the House. With the change in composition of those bodies, there is a better chance that what Tom Wicker calls "court-stripping" legislation will be enacted.

There is a certain amount of fun in all this, if you are a ~~commissioner~~ of crisis. The din of outrage is rising already. Columnists are issuing borrowed constitutional profundities, leaders of the bar are gathering in their usual defensive circle around

Speech
Seventh Circuit
Chicago, Illinois

much wringing of hands about this bill but it is, in truth, by no means unprecedented. Fifteen years ago, in Katzenbach v. Morgan, the Supreme Court decided that Congress could give content to the fourteenth amendment which the Court would accept. There a state literacy test, clearly lawful under the Court's version of the Constitution, was overturned because Congress purported to strike it down under the fourteenth amendment. Senator Orrin Hatch is precisely right when he says liberals applauded that decision but cry "constitutional violation" when the anti-abortion congressmen try the same tactic. Liberals can't have it both ways. Congressional alteration of the Constitution is not noble when it serves their politics and insidious when it services conservative ends.

I disagree with Senator Hatch only when he concludes that "what's sauce for the ~~goose~~ is sauce for the gander." Katzenbach v. Morgan is terrible constitutional law. It stands for a revolution in the constitutional roles of the judiciary and the legislature. It cannot live in the same jurisprudence with Marbury v. Madison and the Chief Justice's dictum, which we have ~~believed~~ this past one and three-quarters centuries, that it is "emphatically the province and the duty of the judicial department to say what the law is." When the sauce for the goose is poisonous, there is no reason to ~~apply it to~~ the gander. Liberal approval of

The Individual, the State, and the First Amendment

Robert H. Bork
Alexander M. Bickel
Professor of Public Law
Yale University

What you are to be offered over the three days of these lectures, it seems entirely safe to predict, are strongly contrasting views of the First Amendment, its proper office, and its fortunes during the era of the Burger Court.

Realized too late the error of using the ——— Burger court in this area or the CJ is usually opposed to these developments I will insider important and which I also oppose. →

Much that is of technical interest to First Amendment aficionados has occurred in the past ten years, but the title I have chosen - The Individual, the State, and the First Amendment - is intended to indicate that I mean to talk about matters of more basic interest that are at stake in this body of law, as they are in our politics and in our culture generally. It is not surprising that the contest between views of the proper relationship between the individual and the society should come to the fore in First Amendment cases. That amendment is pivotal; it both reflects the current balance of opposing philosophies and, in turn, strongly influences the movement of that balance.

Harry Kalven was entirely correct in saying that free speech is so close to the heart of our democratic organization that if we lack an appropriate theory of the First Amendment, we really do not understand the society in which we live. On the evidence at hand, perhaps we do not. And perhaps that is dangerous.

attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.

That is at least the beginning of a theoretical structure for the law, at once filling out the First Amendment and confining its scope. I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it, will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law.

We turn now to three subjects of current interest.

Freedom of the Press

Discussion of press freedom is obligatory because the press has made it so. Not a week goes by without thunderings from the journalistic corps that their freedoms are under assault. Articles appear at regular intervals with titles like "The Judicial War on the Press" or "Judges on the Rampage."

This is somewhat curious since it seems plain that the press has done quite well before the Burger Court. In Pentagon Papers the press was permitted to publish state secrets it knew to have been taken from the government without authorization. In Miami Herald Publishing Co. v. Tornillo the Court struck down a right-of-reply statute that had significant scholarly support. In Cox Broadcasting Corp. v. Cohn a

statute prohibiting publication of a rape victim's name was held invalid. In Landmark Communication v. Virginia the State was held disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct.

In some of those cases, it is possible to believe, the press won more than perhaps it ought to have, though not many journalists are heard to express qualms. Surely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake. The New York Times which had delayed publication for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis. And one may doubt that press freedom requires permission to publish a rape victim's name or to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role.

The press has achieved special status in other ways. A newspaper was free to publish on its front page that an American submarine had succeeded in tapping an undersea Soviet military cable. The submarine had to be recalled and the tap permanently discontinued. Had an ordinary citizen communicated that information directly to the Soviets, he would have been subject to severe penalties.

As a result of the Federal Election Campaign Act, the press has rights of political speech that you and I do not. If we join to buy

call harm. This strain of liberalism holds that only physical or material injury is entitled to be noticed by the law. Thus, for example, the Court tends to assume that it is not a problem if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the "squeamish." The assumption is wrong. The consequences of such "private" indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, tastes, and moral values inculcated do not stay behind in the theater.

A change in moral environment -- in social attitudes toward sex, marriage, duties toward children, and the like -- may as surely be felt as a harm as the possibility of physical violence. The Court has never explained why what the public feels to be a harm may not be counted as one.

The notion that expression must be protected if, in addition to pornography or obscenity, it contains an idea is equally unsupportable. The idea may be expressed in innumerable other ways. Just as the First Amendment has been held to allow restrictions as to time, place, and manner, it hardly seems dangerous to say that ideas may be expressed in many ways, but not in a context of the obscene.

The modern Court makes very little effort to grapple with the problem. It assumes that inhibitions on pornography or obscene speech are dangerous to freedom generally and so must be kept to an absolute minimum. It seems not to remember that for better than a century and

a half this Republic did suppress just such material, either through law or through moral censure so severe as to have the effect of law, and that that suppression never remotely threatened liberty generally.

When the Burger Court, by only a five-to-four vote, allowed some minimal control of pornography in Miller v. California, there was an enormous outcry about censorship. But, in truth, the Court did not put political speech or serious speech of any kind in danger. You will recall that the trier of fact was required to find each of three things before pornography could be banned or its purveyors punished: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Yet even that test appears to have made it impossible for communities to control the torrent of pornography which earlier decisions had loosed upon them. Perhaps that is because there is always a professor around, and a judge to believe him (which reminds one rather of P.T. Barnum's dictum), that the purest pornography is actually a profound parable about the decline of capitalism. Or perhaps it is because a flood of pornography does change moral and aesthetic standards; we become habituated to an environment which we originally wished to avoid. Perhaps there is no way back, but the Court ought not to prevent us from trying to find one.

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INDIANA LAW JOURNAL

Volume 47 FALL 1971 Number 1

NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler's concept of "neutral principles," and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harriss lecture series.

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makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold*'s antecedents were also wrongly decided, *e.g., Meyer v. Nebraska,*[21] which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters,*[22] which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital,*[23] which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and *Lochner v. New York,*[24] which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all . . . at the mercy of legislative majorities?"[25] The correct answer, where the Constitution does not speak, must be "yes."

The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.

The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some

21. 262 U.S. 390 (1922).
22. 268 U.S. 510 (1925).
23. 261 U.S. 525 (1923).
24. 198 U.S. 45 (1905).
25. *Id.* at 59.

cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as *Griswold v. Connecticut*. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: *Skinner v. Oklahoma*[26] (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers); *Kotch v. Board of River Port Pilot Commissioners*[27] (no right to equality is infringed when a state grants pilots' licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); *Goesaert v. Cleary*[28] (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); *Railway Express Agency v. New York*[29] (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); *Shapiro v. Thompson*[30] (a state denies equality if it pays welfare only to persons who have resided in the state for one year); *Levy v. Louisiana*[31] (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

Professor Wechsler notes that Justice Frankfurther expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'."[32] The line is not very thin; it is nonexistent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

We may now be in a position to discuss certain of the problems of legitimacy raised by Professor Wechsler. Central to his worries was the

26. 316 U.S. 535 (1942).
27. 330 U.S. 552 (1947).
28. 335 U.S. 464 (1948).
29. 336 U.S. 106 (1949).
30. 394 U.S. 618 (1969).
31. 391 U.S. 68 (1968).
32. WECHSLER, *supra* note 1, at 11, *citing* Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-28 (1955).

applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*. The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

In either case, the value choice (or, perhaps more accurately, the value impulse) of the fourteenth amendment is fleshed out and made into a legal rule—not by moral precept, not by a determination that claims for association prevail over claims for separation as a general matter, still less by consideration of psychological test results, but on purely juridical grounds.

I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions that trouble Professor Wechsler. An example is *Shelly v. Kraemer*,[36] which held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. Although the amendment speaks only of denials of equal protection of the laws by the state, Chief Justice Vinson's opinion said that judicial enforcement of a private person's discriminatory choice constituted the requisite state action. The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish. Any dispute between private persons about absolutely any aspect of life can be brought to a court by one of the parties; and, if race is involved, the rule of *Shelley* would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination. The principle would apply not merely to the cases hypothesized by Professor Wechsler—the inability of the state to effectuate a will that draws a racial line or to vindicate the privacy of property against a trespasser excluded because of the homeowner's racial preferences—but to any situation in which the person claiming freedom in any relationship had a racial motivation.

That much is the common objection to *Shelley v. Kraemer*, but the trouble with the decision goes deeper. Professor Louis Henkin has suggested that we view the case as correctly decided, accept the principle

36. 334 U.S. 1 (1948).

that must necessarily underline it if it is respectable law and proceed to apply that principle:

> Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or perferred by the Constitution, the state may enforce it.[37]

This attempt to rehabilitate *Shelley* by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough. Professor Henkin's proposal fails the test of the neutral derivation of principle. It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. The judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles. Matters are only made worse by Professor Henkin's suggestion that the judge introduce a small number of exceptions for cases where liberty is more important than equality, for now even the possibility of neutrality in the application of principle is lost. The judge cannot find in the fourteenth amendment or its history any choices between equality and freedom in private affairs. The judge, if he were to undertake this task, would be choosing, as in *Griswold v. Connecticut*, between competing gratifications without constitutional guidance. Indeed, Professor Henkin's description of the process shows that the task he would assign is legislative:

> The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context—the adequacy of progress toward

37. Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 496 (1962).

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Fortune, December, 1968, Vol. LXXVIII, No. 7. Issue [illegible] and August/September 3 [illegible] 540 N. Michigan Ave., Chicago, Illinois 60611. Second-class postage paid at Chicago, Illinois, and at additional mailing offices. Subscriptions: U.S., U.S. possessions, and Canada one year $12, two years $21, three years $27. Single copies $1.00. Address all subscriptions and correspondence concerning them to FORTUNE, 540 N. Michigan Ave., Chicago, Illinois 60611. Executive Offices: Time & Life Building, Rockefeller Center, New York, N.Y. 10020. James A. Linen, President; David W. Brumbaugh, Treasurer; John F. Harvey, Secretary. Authorized as second-class mail by the Post Office Department, Ottawa, Canada, and for payment of postage in cash. Member Audit Bureau of Circulations. [illegible] Time Inc. All rights reserved. Reproduction or use of any or all of the contents without permission is strictly prohibited.

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THE SUPREME COURT NEEDS A NEW PHILOSOPHY

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Brown vs. Board of Education, voiding public-school segregation laws, was surely correct. But the extent to which the Court, in applying the Fourteenth Amendment, has departed from both the allowable meaning of the words and the requirements of consistent principle is suggested by *Robinson vs. Mulkey*. There the Court struck down a provision that had been added to the California constitution by referendum. The provision guaranteed owners of private property the right to sell or lease, or refuse to do either, for any reason they chose. It could be considered an instance of official hostility only if the federal Constitution forbade states to leave private persons free in the field of racial relations. That startling conclusion can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle capable of being uniformly applied.

Where the Constitution does not thrust it into a field, a restrained Supreme Court would deal with the processes by which the policies of representative institutions are made and applied, rather than with the substance of the policies. Intervention to affect processes coupled with refusal to pass on substance does not entail a contradiction. The very reasons that require deference to democratic rule compel the Supreme Court to insist that the rule to which it defers be democratic. A restrained Court should, therefore, be active in the fields of political speech, legislative apportionment, and criminal procedure. Though superficially disparate, these subjects are all integral to the democratic process: political speech affects the formation of opinion; apportionment bears upon the translation of opinion into law; and procedural safeguards ensure that policies chosen are not altered in the very process of their application.

Into a previously avoided thicket

The Warren Court has been active in each of these fields, but with different results from what a restrained approach, concerned with processes, would have yielded. The decisions on apportionment illustrate the point. Population shifts and other factors had left a number of legislatures wretchedly apportioned, and political routes to reform were blocked precisely because the aggrieved voters were underrepresented. The Warren Court can hardly be faulted for entering this previously avoided thicket, but on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed. What the Court in effect decided was that all state legislatures, including both houses of bicameral legislatures, must be apportioned on a population basis—"one man, one vote"—regardless of political, geographic, or historic considerations, or the analogy to the federal Congress, or any other factors that might suggest to the voters themselves the wisdom of some weighting of representation.

Chief Justice WARREN's opinions in this series of cases are remarkable for their inability to muster a supporting argument. They contain little more than a passionate reiteration that equal protection of the laws *must* mean equal weight for each vote. He insisted upon this even when a majority of the voters in every county in Colorado decided by referendum that they wanted an arrangement analogous to the federal system, with apportionment by political units for the upper house of the state legislature. The Chief Justice's principle calls into question all the devices our society has evolved for slowing down hasty majorities: the executive veto, the committee system, the filibuster, the requirement of more than a bare

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TESTIMONY OF JULIUS L. CHAMBERS
ON THE NOMINATION OF JUDGE ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES

Submitted to the Committee
on the Judiciary

United States Senate

October 5, 1987

My name is Julius Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Thank you for allowing me to share with you the views of LDF regarding the nomination of Judge Robert H. Bork to the Supreme Court of the United States.

The NAACP Legal Defense Fund focuses its energies primarily on civil rights litigation before state and federal courts, including the Supreme Court. We represent persons of all colors and persuasions for we seek to advance not merely the interests of racial minorities but also the fortunes of the Nation as a whole. We do this primarily by helping individuals and groups to enforce their right to be free of racial discrimination.

We believe that it would be a profound mistake to elevate Judge Bork to the nation's highest tribunal. We base our opposition both on the actions which Judge Bork has taken in the past and on the position which he continues to advance today.

The Robert Bork of the past repeatedly fought rear-guard actions against the progress of racial equality. He opposed the public accommodations section of the Civil Rights Act of 1964 which prohibits many forms of private racial discrimination.[1] He

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[1] See, e.g., Bork, "Civil Rights -- A Challenge," The New Republic p. 21 (Aug. 31, 1963).

questioned the legitimacy of Shelley v. Kraemer,[2] the unanimous Supreme court ruling that prohibits state court enforcement of racially restrictive covenants.[3] He supported proposed legislation[4] that sought to divest the federal judiciary of the authority to enforce fully the mandate of Brown v. Board of Education.[5]

In his testimony before the Committee, Judge Bork attempted to allay the anxieties of those disturbed by his past. Yet his testimony has only deepened those concerns. Judge Bork appears to base his recantation of his opposition to the Civil Rights Act primarily on the grounds that it has "worked." Nothing in his comments suggest, however, that he has come to understand, much less adopt, the moral principle that animated that legislation.[6] His tardy acceptance of the Civil Rights Act has none of the enthusiasm and certitude with which he attacked it. With respect to his attacks on Shelley and other judicial landmarks that point the way towards racial justice, Judge Bork states that his criti-

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[2]334 U.S. 1 (1948).

[3]See, Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L. J. 15-16 (1971).

[4]See, e.g., Bork, Constitutionality of the President's Busing Proposals (American Enterprise Institute, 1972).

[5]347 U.S. 483 (1954).

[6]Judge Bork has not addressed his earlier view that the Civil Rights Act infringes "a vital area of personal liberty" by forcing "a substantial body of the citizenry...[to] deal with and serve persons with whom they do not wish to associate." Nothing in his comments reassured us that he now sees a principled, constitutional basis for choice between the freedom to discriminate and the right of racial equality.

cism was directed not so much at the judgments as at their rationales. But Judge Bork's past attacks on these critical decisions were often directed at the result of those decisions, not merely at their reasoning.

Judge Bork has insisted that the aggressiveness with which he attacked Supreme Court rulings in his academic writings should be discounted because, after all, academics are paid to be critical. Criticism, however, can take various forms. One consists of constructive criticism that recognizes the unassailable fairness of a decision like Shelley while nonetheless exploring theoretical difficulties implicated by the Court's reasoning. Without evading these difficulties, constructive critics such as Professors Louis Henkin and Charles Black sought to nourish the Court's ground-breaking decisions with their intellects. Judge Bork, on the other hand, has sought, not to find a more rigorous basis for the decision in Shelley, but to establish that Shelley was wrongly decided. Prior to Shelley state courts, in the guise of enforcing restrictive covenants, could segregate entire cities on the basis of race. Judge Bork would uphold the power of state courts to do this, despite the enormous injustice involved, largely because he is unwilling to distinguish that situation from the obviously different circumstances that arise when a homeowner decides to exclude an unwanted guest from his living room.

Judge Bork has sought to escape responsibility for his scholarly writings on the ground that they represent him in his identity as a speculative academic. He assures the Committee that in his identity as a Justice, he would think and act differently. It is unrealistic to believe, however, that a person with as sharply etched an ideological agenda as Judge Bork's will renounce or even restrain his ideas at the very moment he becomes empowered to read them into fundamental law.

In his testimony before this Committee, Judge Bork spoke of the majesty of Brown v. Board of Education.[7] But he has never exhibited an authentic embrace of Brown's spirit and, indeed, under incisive questioning by various Senators, Judge Bork conceded that even now he harbors significant reservations about the jurisprudential validity of Bolling v. Sharpe,[8] the companion case to Brown, which prohibited segregation imposed by the federal government in the public schools of the District of Columbia. That Judge Bork continues to find such difficulty in finding a palatable rationale for invalidating federal as opposed to state segregation is itself cause for grave alarm.

Judge Bork suggests that the result in Bolling might be justified on First Amendment grounds. Professor Tribe has already demonstrated that this alternative theory may well be

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[7] 347 U.S. 483 (1954).

[8] 347 U.S. 497 (1954).

insufficient to invalidate racial segregation of the schools in the District of Columbia. Even if this theory proved adequate in the educational context, all other forms of racial discrimination by the federal government, as well as discrimination on the basis of sex and national origin would be constitutional if Bolling were overruled.

Judge Bork and his supporters have asserted that during his career on the Court of Appeals he has consistently ruled in favor of claimants alleging racial discrimination. The handful of cases to which they refer, however, does little to dispel the pall of mistrust that has been cast over Judge Bork by his own career. First, the cases are too few in number to support the load they have been made to bear. Second, as a member of the Court of Appeals, Judge Bork was far more constrained than he would be on the Supreme Court. This stems from the difference in the dockets of these two courts and in the difference of their relative positions in the judicial hierarchy. The Court of Appeals routinely hears cases in which the applicable law is settled. The Supreme Court, by contrast, typically hears cases only if the applicable law is unsettled. Judges on the Court of Appeals are charged with following Supreme Court precedent. Supreme Court Justices create the precedent that lower judges follow. In sum, at the Court of Appeals the law is often so clear, the countervailing forces so strong, and the costs so high in terms of future advancement that it would simply be impolitic

for an ambitious judge to go against the tide. At the pinnacle of our judicial system, however, Judge Bork would be in a position to help determine the tide.

The fact that none of Judge Bork's 150 or more majority opinions have ever been reversed is of less significance than some of his supporters have implied. As other witnesses have noted, only one of those opinions has ever been accepted for review by the Supreme Court, and the Court has yet to decide that case. As a practical matter, many sitting appellate judges have had none of their opinions reversed over the last 5 years. During recent years the federal appellate courts dispose of between 28,000 and 30,000 appeals; the Supreme Court, however, grants review in only about 200 cases, and reverses approximately 80% of these. About half of the cases come to the Supreme Court from the state courts, rather than from the federal appellate courts. Thus among federal appellate cases, only a small fraction of one percent are ever reversed by the Supreme Court.

Judge Bork has sought to allay the concerns of the Senate by asserting his respect for precedent. But here, too, his reassurance is unpersuasive. First, Judge Bork's recent testimony is not consistent with his prior remarks. "An originalist judge," Judge Bork declared as recently as January 31st of this year, "would have no problem whatever in overruling a nonoriginalist precedent, because that precedent, by the very basis of his

judicial philosophy, has no legitimacy."[9] Second, as Judge Bork himself noted in testimony before the Committee, there exists a convention in the Supreme Court of according less respect to stare decisis in constitutional as opposed to statutory interpretation. Third, although Judge Bork promises that he would think hard before overruling precedent upon which expectations and institutions have been built, the aggressive tenor of his past denunciations of various holdings suggest a strong predisposition towards a judicial activism that would seek to unravel consensus in some of the most sensitive areas of our national life. Fourth, there are many ways to kill a prior decision other than by expressly overruling it. A Justice can simply ignore precedent with which he disagrees or confine it so narrowly as to deprive it of generative power.

The Robert Bork of the present also holds views that endanger the legal status of racial minorities. According to his recent testimony before this Committee, in evaluating the constitutionality of statutes drawing racial classifications, Judge Bork would substitute an all-embracing "reasonableness" test for the Court's present methodology. Under current doctrine, any statute or other official action that employs a racial classification must undergo "strict scrutiny." This means that in order to be upheld the government must show that the action in

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[9]Transcript, Speech Federalist Society, January 31, 1987.

question is narrowly tailored to serve a compelling interest. Judge Bork, on the other hand, would simply require that a statute drawing a racial classification be shown to be reasonable in order to be upheld.

Judge Bork's position is deeply troubling. First, it diminishes the degree of judicial protection now accorded to racial minorities, the very groups that historically have been most vulnerable to invidious discrimination. After all, for a long time segregation was deemed to be reasonable by many persons, including a majority of the Justices of the Supreme Court. The doctrine of strict scrutiny represents the Court's attempt to learn from its own historical errors. It represents the Court's understanding that, given the subtle force of racial bias, prudence requires an especially heavy burden of persuasion whenever the government employs racial classifications. Judge Bork clearly has in mind charting a different path. And although it may seem at first blush that what he seeks is simply to handle potential victims of bias more equally by subjecting all governmental classifications to the same test, what his test actually forebodes is a tragic situation in which the historic victims of prejudice -- minorities, women, aliens -- will share equally in lessened degree of protection.

A second problem is rather ironic in light of Judge Bork laims to be an advocate of judicial restraint. The reasonable-ess test he now articulates provides far too little restraint on dges and Justices whose conception of reasonableness might in-ine them to validate racially oppressive policies. Current octrine at least requires a compelling governmental interest in rder to be sustained. Under Judge Bork's test, Justices are ft with nothing to guide them except a vague, manipulable, and cessarily subjective standard. Judge Bork suggests that his wly minted theory can be given form by canvassing the opinions the public as manifested by legislation. But, of course, that poses a danger since it is precisely for protection against cridled majoritarianism that minorities turn to the judiciary.

A third problem with Judge Bork's reasonableness test is t substantively it provides far too little support to the stitutional principle of racial equality. A few years ago, a ge in Florida removed a child of divorced parents from her her's custody and awarded custody to the father because the her had chosen to marry as her second husband a man who hap-ed to be black. This state judge was not necessarily a bigot. sought to act in what he regarded as the best interest of the ld, stating that a youngster raised in central Florida by an erracial couple was sure to suffer from social stigmatization. a practical matter, regrettably, that might have been the

case. Yet, in the unanimous decision of Palmore v. Sidoti[10] the Supreme Court reversed, observing that racial classifications of this sort require more than reasonableness. The Court insisted that the racial classification used by the state judge would have to survive "the most exacting scrutiny."[11] It could not meet that burden because the concerns of the judge, though reasonable, would have allowed fears regarding the consequences of prejudice to subordinate the principle of racial equality. We are afraid that that sort of forthright, unflinching support for racial justice would be weakened by a Supreme Court including Robert Bork.

Judge Bork suggested in his testimony that he might conform his reasonable basis theory to present law by deeming all racial classifications to be inherently unreasonable. But while this view might prohibit the sorts of state practices condemned in Brown, it would also have the effect in many instances of precluding any effective remedy, since frequently the correction of discriminatory practices requires the courts to order some form of race conscious action. Although there is considerable disagreement within the present Supreme Court regarding the appropriable constitutional standard for evaluating affirmative action, every current member of the Court agrees that there are circumstances in which both voluntary and court ordered race

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[10] 466 U.S. 429 (1984).

[11] Id. at 432.

conscious affirmative action are constitutional.

This nomination is of particular importance because of the pivotal role that was played in the past by Justice Powell, whose seat on the Court Judge Bork seeks to fill. During the 1985-86 term, Justice Powell dissented less than any other Justice and often cast the deciding vote in closely divided cases. Among the 6 decisions decided by a vote of 5 to 4, Justice Powell voted with the majority 28 times. Justice Powell insisted that he did not cast his votes on the basis of any fixed ideology or philosophy, but acted on a case by case basis. The approach contrasts sharply with the ideological agenda and approach which Judge Bork would bring to the Court.

The Senate should bear in mind that the views which Judge Bork would bring to the Court would be particularly important as well in determining what types of cases the Court would choose to hear. The Supreme Court has discretion to select for argument and written opinion whichever cases it deems of interest and importance. The agenda the Court sets for itself has an inexorable tendency to set the agenda for the lower federal courts, and to some degree for the nation. A Justice who disagrees with a prior precedent or statute can severely limit its vitality simply by refusing to grant review in any case in which that precedent or law was violated, or by regularly voting to review and overturn any decisions in which the precedent or law was enforced

below. The Supreme Court gave major impetus to the civil rights movement over the last 30 years, not only because of the substance of its decision, but also because it was willing to review a large number of civil rights cases in which the claims of racial minorities had been rejected below. The willingness of the Court in the years ahead to grant review in such cases will be as important as the substance of its civil rights opinions.

Never in my career have we seen a nomination so widely and bitterly opposed within the minority community as the nomination of Judge Bork. People are intensely fearful and, unfortunately, with good reason. The NAACP Legal Defense Fund joins with other historic defenders of civil rights in asking that the Senate Judiciary Committee reject Judge Bork's nomination.

Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

October 8, 1987
A Statement on the nomination of Judge Bork.
By: James M. Nabrit, III
Associate Director-Counsel
N.A.A.C.P. Legal Defense and Educational Fund, Inc.

In December 1952 I cut my law school classes to watch my father argue a case called Bolling v. Sharpe in the U.S. Supreme Court. On May 17, 1954 the Supreme Court decided in Bolling that the due process clause of the Fifth Amendment, which protects "liberty" against infringement by the federal government, prohibited racial segregation in the Washington, D.C., public schools. I have thought of those arguments a great deal since I heard Judge Bork say, in response to conscientious questions by Senator Specter, that he disagreed with the Bolling Court's reliance on the due process clause, and that he could think of no other ground to support the decision.

Judge Bork later said that he would follow the Bolling precedent notwithstanding his disagreement with it, that Congress would never reimpose segregation in the D.C. schools, and that maybe the First Amendment right of free association might outlaw segregation. These added points did nothing to relieve my apprehensions about Judge Bork's opinion that the ideal of fairness embodied in the concept of "liberty" protected by the due process clause did not include a rule against race discrimination.

Of course I had heard Judge Bork's thesis expressed

very clearly 35 years ago. Milton Korman, the lawyer who defended the segregated school system which I attended as a child, told the Supreme Court in Bolling:

> "The Fifth Amendment contains a due process clause, as does the Fourteenth Amendment. It does not, however, contain an equal protection clause. It has been said by this Court that the Congress is not bound not to pass discriminatory laws. It can pass discriminatory laws, because there is no equal protection clause in the Fifth Amendment."

I found it stunning to learn that after all these years Judge Bork still seems to believe, as Mr. Korman did years ago, that nothing in our Constitution prohibits race discrimination by agencies of the federal government. If the due process clause of the Fifth Amendment does not prohibit race discrimination by federal agencies, then what clause does? And what about gender discrimination? Are federal agencies, in Judge Bork's view, free of any constitutional restraints on race or gender discrimination?

Judge Bork did not, and I am sure would not, articulate a general non-discrimination principle based on the First Amendment protection of free association. That suggestion is a bit hard to take seriously coming from Judge Bork whose 1963 New Republic article used the freedom of association idea as a sword against a bill prohibiting race discrimination in public accommodations. (That bad idea is still at large, although Judge Bork has abandoned it. On October 5, 1987, the Supreme Court agreed to hear

a case in which some of Judge Bork's 1963 ideas are now being urged by all-male private clubs in their attack on New York City's public accommodations law.)

Judge Bork is correct in thinking that Congress will not enact a new segregation law for the D.C. schools. But, just as surely there will be American citizens who will come to our courts claiming that they are victims of race, or gender, discrimination by some agents of our vast federal establishment. I cannot believe that our people, or the Senate, want such citizens to be met, as Spottswood Thomas Bolling was, by the Korman/Bork argument that discrimination by federal agencies was not intended to be forbidden by the Founding Fathers, and is not outlawed by the Due Process Clause or any other part of our Constitution.

Judge Bork's narrow view of the meaning of "liberty" as protected by due process presents a broad threat to our civil rights. The man who taught me about due process of law in 1952 was also a witness at the recent hearings. John P. Frank testified that if he was a black person he would be scared to death at the thought of Judge Bork on the Supreme Court. Mr. Frank was quite right. I am scared about that prospect. Another of my teachers also testified against Judge Bork in persuasive words. Nicholas DeB. Katzenbach said that he thought Judge Bork lacked the qualities of judgment we wanted on our highest court. I

agree. I hope that the Senate votes to reject this nomination and that the President names another person who believes that due process of law forbids race discrimination. That lawyer should not be too hard to find. Every member of the Court since 1954 has met that test.

October 12, 1987

Senator Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator Biden:

In reviewing the hearing record on the nomination of Judge Robert H. Bork to become Associate Justice of the Supreme Court of the United States, I observed three principal themes in his judicial philosophy that have proceeded with unwavering consistency from his writings to his judicial record through his five days of hearings before this Committee. These themes received less attention than other subjects, notwithstanding their formidable, structural significance for the resolution of the conflict between the distribution of power and the application of the rule of law. In brief, these juristic mind sets are:

1. Judicial Exclusion -- Judge Bork's courtroom door is difficult to open. He possesses a view of "standing to sue" so restrictive that he will rest his decisions on strained constitutional interpretations of "cases" and "controversies" under Article III to overcome explicit statutory language permitting any aggrieved person to bring a lawsuit. This view works against parties, such as consumers, environmentalists and civil rights advocates, whose claims are not often economically quantifiable nor unique to the rest of the society. Instead their claims, as in the health and safety sector, are more weighty, more universal and more irreversible than the monetary interests of businesses who find Judge Bork's door more open to adjudication. See Center for Auto Safety v. Thomas, 806 F.2d 1071 (D.C. Cir. 1986), vacated and rehearing en banc granted, 810 F.2d 900 (D.C. Cir. 1987) and Bellotti v. Nuclear Regulatory Commission, 725 F.2d 1380 (D.C. Cir. 1983). In Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985), Judge Bork's dissent contained this categorical desire for slamming the federal courtroom door: "[W]e ought to renounce outright the whole notion of congressional standing." (See Attachment I).

Foreclosing standing to sue was a major factor in the opposition to Judge Bork by the Sierra Club, the Environmental Policy Institute, Environmental Action, the Natural Resources Defense Council and the grave concern expressed by the National Audubon Society. (See Attachment II).

Other exclusionary positions which Judge Bork has taken include broad interpretations of the doctrine of sovereign immunity, narrow interpretations of the Freedom of Information Act and attorneys' fees statutes and a rigid application of statutes of limitations, and related provisions, even when constitutional claims are being made. In addition, he leans against judicial review of agency actions when the challenge is coming from non-business parties -- namely consumer, environmental and labor challengers of regulatory behavior or decisions. Practitioners before the D.C. Circuit know the probabilities of their failure in such representations should they draw Judge Bork. This courtroom horse sense is not lightly disregarded. His ultimate doorslamming performance came ten years ago when he delivered an address before the Pound Foundation Conference recommending the exclusion of personal injury and social welfare cases from the federal courts and their placement before "an entirely new set of tribunals that would take over completely...." (See attachment III).

2. Executive Supremacy -- Judge Bork's views and positions on the relation of Presidential power vis-a-vis Congress, the courts and the citizenry qualify him as an autocrat. His exchange with Senator Robert Byrd over the right of Congress and members of Congress to challenge lawless encroachments by the Executive branch demonstrates how far removed his extremism is

from both established constitutional precedents and any practical recognition of resolving deadlocks between Executive and Legislative branches. Other areas where his views flag his potential directions, should he have an opportunity to decide from the Supreme Court, include the law providing for independent special prosecutors, the War Powers Act, Executive Privilege and congressional limitations on the Executive's conduct of foreign affairs. (See Attachment IV). His autocratic jurisprudence was applied, as Solicitor General, in the firing of Special Prosecutor Archibald Cox in 1973 -- an act deemed unlawful by a judicial decision on the matter and by many legal specialists.

3. Economic Predation -- The clashes between raw power and prudent law have marked the operations of the marketplace in our nation's economic history. Judge Bork's views on the legislative history, purposes and specific interpretations of the antitrust laws have been expounded in articles, his book, The Antitrust Paradox, and through numerous speeches and fewer judicial decisions. Suffice it to say that he disagrees with most of the major Supreme Court decisions in the antitrust area over the past 50 years, that he would not prohibit practices such as resale price maintenance, vertical restrictions and mergers (which established precedent would ban) and that his definition of "consumer welfare" is peculiarly associated with the term "allocation efficiency" in all its vainglorious state of empirical starvation and flouting of clear legislative history. Dean Robert Pitofsky of the Georgetown University Law School has written that Judge Bork is "ready and willing to substitute his views for statutory language, legislative history and precedent when it suits his ideological agenda." Dean Pitofsky adds: "His views with respect to antitrust policy are extreme. They are so radical, in fact, that they would virtually eliminate enforcement of the antitrust laws except in the area of cartel activity, and would injure, rather than enhance, consumer welfare."

Whether judging conflicts between big business and consumers/workers, or writing about antitrust laws and market shares, or representing corporate clients, Robert Bork has placed his mind on the side of an oligarchic view of the economy. This view would become more than of academic interest were Bork to be confirmed. For, as his colleague in thought, Professor Richard A. Epstein of the University of Chicago Law School, wrote in the New York Times business pages on August 23, 1987: "Constitutional questions of economic liberties will frequently confront Judge Bork if elevated to the Supreme Court. The current constitutional protection of property rights has been sorely lacking on such important matters as land use control, rent control and retroactive economic legislation." Writing in the September 14, 1987 issue of Legal Times, Jonathan Sallet discusses two recent land-use cases decided by the Supreme Court earlier this year as the "most protective of property rights in recent memory." He concluded that "these two decisions are activist rulings that will hamper the promulgation of legitimate land use regulations and will obstruct attempts by local governments to preserve our environment." He sees the Court as being on "the verge of reconstitutionalizing doctrines of economic protectionism rejected by the Court a half-century ago." Adding Judge Bork to the Court at this time will have major consequences in this re-appearing sector of constitutional property rights cases heading for the Court's docket. (See Attachments V and VI).

It is consistent with the description of Robert Bork as an autocrat and oligarch in his judicial philosophy that he failed to mention the word "justice" once during his five days of testimony, except in reference to a Justice of the Supreme Court and in an excerpt which he read to the Committee of another person's writings. In Judge Bork's courtroom, you will be more congenially received and judged if you were born a corporation than if you were born a human. The great rights of access to justice, the federal checks and balances and the economic freedom from predation represent the basic tests which Robert Bork fails by virtue of his belief and practice.

In conclusion, your resolve in opposing the Bork nomination is, of course, appreciated by many Americans. It is hoped that they can expect a continuation of such concentration until a wise and learned nominee is confirmed by the Senate for Associate Justice of the Supreme Court.

Sincerely yours,

Ralph Nader

Enc: Attachments I-VI

ATTACHMENT I

CONGRESSIONAL PLAINTIFFS

This is a list of current members of the United States Senate who filed lawsuits claiming injury in their capacity as Members of Congress, followed by a list of cases showing which Senator was a plaintiff in each case. In some cases, the Senator filed suit during earlier service as a member of the House of Representatives.

Brock Adams (D-Wash.)
William L. Armstrong (R-Colo.)
William S. Cohen (R-Me.)
Jake Garn (R-Utah)
Charles E. Grassley (R-Iowa)
Tom Harkin (D-Iowa)
Orrin G. Hatch (R-Utah)
Jesse Helms (R-N.C.)
Gordon J. Humphrey (R-N.H.)
Robert W. Kasten, Jr. (R-Wis.)
Edward M. Kennedy (D-Mass.)
Patrick J. Leahy (D-Vt.)
James A. McClure (R-Ida.)
Spark M. Matsunaga (D-Hawaii)
John Melcher (D-Mont.)
Howard M. Metzenbaum (D-Ohio)
Barbara A. Mikulski (D-Md.)
Claiborne Pell (D-R.I.)
Larry Pressler (R-S.D.)
William Proxmire (D-Wis.)
Dan Quayle (R-Ind.)
Donald W. Riegle, Jr. (D-Mich.)
Richard C. Shelby (D-Ala.)
Paul Simon (D-Ill.)
Steve Symms (R-Ida.)
Strom Thurmond (R-S.C.)
Paul S. Trible (R-Va.)

CASES

American Conservative Union v. Carter, No. 79-2495 (D.D.C. Dec. 14, 1979)(Sens. Garn, Helms, Humphrey, Laxalt, McClure, Symms, Thurmond)

Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987)(Sens. Mikulski, Simon)

Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984)(Sens. Harkin, Mikulski)

Edwards v. Carter, 445 F. Supp. 1279 (D.D.C.), aff'd on other grounds, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978)(Sens. Armstrong, Grassley, Kasten, Pressler, Quayle, Symms, Trible)

Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.)(en banc), vacated, 444 U.S. 996 (1979)(Sens. Garn, Hatch, Helms, Humphrey, McClure, Quayle, Symms, Thurmond)

Helms v. Vance, No. 77-83 (D.D.C. March 23, 1977), aff'd mem., No. 77-1295 (D.C. Cir. May 3, 1977), cert. denied, 432 U.S. 907 (1977)(Sens. Helms, McClure, Thurmond)

Humphrey v. Baker, No. 87-128 (D.D.C. June 30, 1987)(Sen. Humphrey)

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)(Sen. Kennedy)

Lowry v. Reagan, No. 87-2196 (D.D.C.)(Sens. Adams, Matsunaga and Simon)

McClure v. Carter, 513 F. Supp. 265 (D. Ida.)(three-judge court), aff'd sub nom. McClure v. Reagan, 454 U.S. 1025 (1981)(Sen. McClure)

McClure v. Linowitz, No. 77-436 (D.D.C. May 10, 1977)(Sen. McClure)

Maremont Corp. v. Rumsfeld, No. 76-895 (D.D.C. July 2, 1976), dismissed with prejudice (Sept. 21, 1976)(Sen. Cohen)

Melcher v. Federal Open Market Comm., 644 F. Supp. 510 (D.D.C. 1986), appeal pending, No. 86-5692 (D.C. Cir.)(Sen. Melcher)

Metzenbaum v. Brown, 448 F. Supp. 538 (D.D.C. 1978)(Sen. Metzenbaum)

Mid-Ohio Food Bank v. Lyng, No. 87-252 (D.D.C. July 20, 1987)(Sen. Leahy)

Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985)(Sen. Shelby)

Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), aff'd sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978)(Sen. Pressler)

Proxmire v. Bork, No. 2148-73 (D.D.C. Oct. 30, 1973)(Sen. Proxmire)

Riegle v. Federal Open Market Comm., 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981)(Sen. Riegle)

Trible v. Brown, No. 79-1228 (4th Cir. April 27, 1979)(Sen. Trible)

Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973)(Sen. Pell)

ATTACHMENT II

SIERRA CLUB

SIERRA CLUB
LEGAL DEFENSE FUND, INC.

FOR IMMEDIATE RELEASE:
September 22, 1987

Contact: Durwood Zaelke 202/667-4500 (SCLDF)
Adrienne Weissman 202/547-1141 (Sierra Club)
Joanne Hurley 415/776-2211 (Sierra Club)

ENVIRONMENTAL GROUPS OPPOSE BORK

Washington, D.C. "Judge Robert H. Bork's position on access to the courts is so restrictive that most environmental plaintiffs would be disqualified," the leaders of two prominent environmental organizations said today when announcing their opposition to Bork's nomination to the United States Supreme Court.

The Sierra Club Legal Defense Fund, one of the largest environmental litigators in the country, and leaders of the 416,000-member Sierra Club, decided after a study of Judge Bork's record to oppose the nomination. This is the first time either organization has taken a position on a judicial nomination at any level.

The organizations base their opposition on three general areas of Judge Bork's judicial record: his narrow view of citizen access to the courts, his narrow view of access to information, and his reluctance to scrutinize carefully decisions by public agencies that fail to protect the public interest.

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Durwood Zaelke, a Staff Attorney with the Sierra Club Legal Defense Fund said, "Major advances have been made in the last two decades in protecting public health and the environment from industrial pollution and other assaults--advances made by citizens who have fought and won hundreds of cases in the federal courts, many of them brought by the Sierra Club Legal Defense Fund representing the Sierra Club and its 416,000 members.

"Judge Bork now threatens to reverse these gains in protecting the environment by closing the courthouse doors to these citizens and groups--by limiting their 'standing to sue.'

"If citizens can't get into court, they don't have a chance at justice. Trees and forests don't have standing; our rivers and lakes can't argue for clean water; our fish and wildlife can't protect themselves. Only citizens and groups like the Sierra Club can protect the environment."

J. Michael McCloskey, speaking for the Sierra Club, said, "Judge Bork clearly tilts toward industry at the expense of public health. When citizens sue federal agencies, Judge Bork generally sides with the agencies, giving great deference to their discretionary powers. When industry sues the same federal agencies, Judge Bork nearly always defers to industry and

overrules the agencies. It's a double standard that has no place on the Supreme Court."

Zaelke said, "In nearly all the cases we examined, Judge Bork voted to withhold information from the public. We can't be successful litigators if the government is allowed to decide what information the public will be permitted to receive. This is clear interference with the will of Congress."

McCloskey summed up, "Our organizations exist to defend the natural resources and public health of our country and its citizens. We use the courts extensively to ensure that the environmental laws of the land are faithfully and diligently carried out. Judge Bork represents a troubling retreat from the environmental progress of the last two decades."

-30-

ATTACHMENT III

DEALING WITH THE OVERLOAD IN ARTICLE III COURTS

by

THE HONORABLE ROBERT H. BORK
Solicitor General of the United States

I have been asked to say a few words about an embryonic project within the Department of Justice which, we have the temerity to believe, may be relevant to your deliberations. It is only fair, if painful, to say that our effort has been embryonic rather longer than nature usually provides for that stage of development, but it is also true that we have begun to progress, and that we hope soon to have substantive proposals developed sufficiently to solicit comments. What I have to say today, however, represents my own thought and not that of the departmental committee I chair. Most particularly, it does not represent the views of the Attorney General or the Deputy Attorney General, gentlemen who have enough opinions of their own to answer for without this additional burden. Before a departmental position is taken, quite obviously, the Attorney General and the Deputy will have to be persuaded of the self-evident correctness of what I am about to say to you.

Your topic today concerns the types of disputes best assigned to courts and the types better assigned to another forum. The

question appears to assume that we have been using courts to resolve some disputes for which they are not suited and that assumption is certainly justified. Yet candor, if not, in this company, prudence, requires me at least to remark in passing that some of the judiciary's problems in this respect are self-inflicted. The truth is that the more appropriate forum for many disputes now resolved by the judiciary is the democratic political process. Courts have upon occasion strained language and doctrine to extend their powers of review in an effort to ensure fairness in the manifold relationships of government and individuals. The intention is commendable but the result is often an unjustified shrinkage of the area of majority rule and, more to the point today, the acquisition by the judiciary of problems which they lack the criteria and the information to handle. We should not forget, then, that part of the solution to the problem posed lies entirely within the control of the courts.

But the topic I will address, and the topic that will be addressed by the committee the Attorney General has established within the Department of Justice, constitutes a different slice of your concerns here. It is the allocation of types of disputes between different Article III courts and between Article III courts and other kinds of tribunals. We were brought to study that by the observation that there is, and for some years has been, a slow crisis building in the administration of justice by the federal court system. It has been urged at this conference, and properly so, that we think not just about the problems of judges but attend also to the problems of litigants. A crisis for the courts, however, is as well a crisis for litigants and for the society.

The cause of the crisis is simply overload, an overload so serious that the integrity of the federal system is threatened, an overload so little recognized that the bleak significance of plain, not to say obtrusive, symptoms is not fully credited by the bar, and, apparently, not by Congress.

Increasing population and commercial and industrial growth would in any event cause a rise in the federal caseload, but such causes would hardly have produced figures such as those with which we are all too familiar. I will not repeat the statistics in detail but it is apparent that caseload has not merely risen dramatically but that the real acceleration began in the 1960's. In the period of twenty years from 1940 to 1960 the increase was just under 77 percent, but in the next fifteen years, it was just over 106 percent and it continues to rise.

The reason for increases so large seems apparent. We, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state. The tasks government undertakes grow steadily more numerous and always more complex. All of the branches of government are changed by the pressure of decision making but perhaps none more than the federal judiciary.

The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model. The symptoms are everywhere.

As caseloads rise, courts try to compensate. Time for oral argument is steadily cut back and is now often so short in the courts of appeals as to destroy most of its value. Some courts of appeals eliminate oral argument altogether in many cases. The statistics are not entirely clear but perhaps 30 percent or more of the cases are decided without any oral argument whatever.

The practice of delivering written opinions is also declining and now seems to be omitted in about 34 percent of decided cases at the court of appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.

These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy.

There is more. These are merely the most visible symptoms. Courts are adding more judges, more clerks, more administrative personnel, moving faster and faster. They are in imminent danger of losing the quality of collegiality, losing time for conference, time for deliberation, time for the slow maturation of principle.

As a society we are attempting to apply law and judicial processes to more and more aspects of life in a self-defeating effort to guarantee every minor right people think they ought ideally to possess. Simultaneously, we are complicating trial and pretrial procedures in what must ultimately be an impossible effort to make every trial perfect. The two trends, I think, are flatly in-

compatible. We are seeking to handcraft every case. At the same time we are thrusting a workload upon the courts that forces them towards an assembly line model.

Assembly line processes cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist view of the law, wisdom, mature and dispassionate reflection, and—especially important for the perceived legitimacy of judicial authority—careful and reasoned explanation of their decisions.

It was suggested last night that, with the decline of other institutions that create and sustain social norms and ethical values, law must take over more of that role. If law fails to perform that function, it was said, society will be in deep trouble. It is worth noting, therefore, that as law proliferates and is made up faster and faster, it tends to become intellectually incoherent and inconsistent within itself. Law in that condition cannot command respect and cannot succeed as a bulwark of a moral consensus.

It is for these reasons that the Department of Justice decided to study the problem and to suggest solutions. Quite possibly, as some of the speakers this morning suggested, we rely upon formal adjudicative processes too much. Possibly, as a society, we rely upon law too much. But these are matters beyond the scope of our study and our efforts. We are accepting the adjudicative process in something like its present form as given, at least for federal law in the foreseeable future, and asking what can be done within that framework. It seems to me, though my supposition has not yet been laid before my colleagues at the Department, that one remedy lies in a thorough-going overhaul of federal jurisdiction rather than tinkering with such things as the jurisdiction of magistrates or continually adding federal judges.

I recognize that more judges are desperately needed now but it is not the preferred solution. A powerful judiciary, as Felix Frankfurter once said, is necessarily a small judiciary. Large numbers dilute prestige, a major attraction of a career on the bench, and make it harder to recruit first-rate lawyers. Large numbers damage collegiality, lessen esprit, and diminish the possibility of interaction throughout the judicial corps. The likelihood not only of inter-circuit but of intra-circuit and inter-district conflicts rises, with all the costs of increased confusion and litigation that entails. However essential it is today, and it is essential, in the long-run continual increases in the size of the federal judiciary may prove a calamitous answer to the problem.

I will suggest in a moment a way of keeping the Article III judicial corps small while increasing the federal capacity for adjudication.

We are forced, I think, to the conclusion that only a reallocation of disputes among types of tribunals offers any long-run hope for the federal judicial system. Some of what I have to say will be familiar; some, I hope, will not. Taken together, these suggestions add up to a proposal for a drastic reduction of the jurisdiction of Article III courts.

The criteria to be used in reallocating disputes to other tribunals are whether the present allocation is necessary to serve some important value and whether the courts now deciding cases are better qualified, have greater expertise, than the alternative forum.

Let me begin with the Supreme Court, where, I am sorry to say, I have, at least so far, least to suggest. The pressures upon that Court are reaching intolerable levels and it is imperative that something be done to relieve them. The most recent proposal is the creation of a National Court of Appeals. Some of the support for this proposal, however, rests upon an ambiguity. The Commission that proposed it did not intend to lighten the workload of the Supreme Court. They intended to double the system's capacity to make final appellate decisions of national scope. Their premise is that too many important inter-circuit conflicts go unresolved because the Supreme Court cannot address them. Judgment in such matters is necessarily somewhat impressionistic and I can only say that I am not aware of a serious problem in this respect, certainly not a problem of the dimensions that would justify a major structural change in the federal court system. The solution is disproportionate to the problem.

Others, including some Justices of the Court, are attracted to the idea of the new court as a means of lightening the Supreme Court's burden. I am not at all sure it would. The Supreme Court would have to make additional decisions. Besides deciding whether a petition for certiorari presented a case meriting review, the Supreme Court would have to decide whether the issue was appropriate for it or for the National Court of Appeals. That is no simple decision, particularly since it is often difficult, at the jurisdictional stage, to know precisely upon what a case may ultimately turn or what implications the decision will have. To know those things is effectively to have decided the case.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Su-

preme Court, to ensure that an issue had not been definitely resolved, or even dicta pronounced, in a manner contrary to its own views. The necessity of granting plenary review of a decision of the national court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate tiers of federal adjudication, and the result might be to increase rather than decrease the burden upon the Supreme Court.

If I am highly dubious about the idea of a National Court of Appeals, I confess that I am also not sure what can be done to relieve the Supreme Court. But it is clear that the abolition of mandatory appeals would be a substantial contribution. Whatever their merits once, three-judge district courts are simply no longer necessary and they waste judicial manpower at the trial level. Virtually all the supposed benefits of three-judge courts are obtainable under current law when a court of appeals stays an injunction issued by a single district judge. Courts of appeals, which are also likely to represent a broader cross-section of the nation, are quick to stay injunctions issued in highly controversial cases.

Cases on direct appeal from three-judge district courts typically make up about 3 percent of the Supreme Court's docket but, despite summary disposition of the majority, they routinely constitute the astonishingly high figure of 22 percent of all cases argued orally. Furthermore, the cases reach the Court directly from a trial court without an intermediate opportunity to sift the record and focus the issues. They thus consume a proportion of the Court's time and energy disproportionate to their members. They should be abolished.[1]

If we turn our attention to the courts of appeals and the district courts there are more obvious targets for reform. The first one is the old favorite, diversity jurisdiction.

In 1975 there were 30,631 diversity cases pending in the federal courts, or 21.5 percent of the total docket. That figure may be discounted in certain ways, although we are not sure how large the discount should be. It is possible, for example, that diversity cases take up less judicial time on the average than do other types of cases. It is also possible that they are settled out of court in greater proportions. We do not know and those matters will have to be investigated. But on any view of the question, diversity jurisdiction comprises a large segment of the federal docket. If

[1] 28 U.S.C. §§ 1252 and 1254(2) should also be repealed. They provide mandatory appeals and would be used much more if three-judge courts were abolished.

it can be abolished without serious costs to the administration of justice, the benefits to the federal system would be substantial.

The historic argument for diversity jurisdiction—the potential bias of local courts—derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. It may be safe to assume that this rationale has now been so weakened that it no longer supports the practice. [There are proposals to leave with the out-of-state party the discretion to choose the federal forum, but that option would probably undercut the reform. To say that is not to admit the existence of regional bias but rather to recognize that federal courts have other attractions to litigants, a fact shown when local plaintiffs choose the federal court.] It would probably be better to limit the option for the federal forum to those cases in which the out-of-state party can make at least a colorable showing of local prejudice.

Federal courts have no expertise in the application of state law and are particularly disadvantaged when a diversity suit requires the decision of a point not settled by the state courts. Nor would abolition of diversity jurisdiction harm the state courts. It would increase their dockets apparently only by about 1.5 percent.

An argument that must be taken seriously, because of the source from which it emanates, is that diversity cases serve the useful purpose of reminding federal courts they are courts and not simply constitutional tribunals. The idea appears to be that immersion in common law and statutory issues of the sort provided by tort and contract actions conditions the judge's thought so that he does not emerge as a free-hand policy maker when he approaches constitutional issues. The answer seems to me to be that federal question jurisdiction keeps judges close enough to hard, technical issues to keep them versed in close reasoning and that any incremental discipline provided by automobile accident cases is too small to justify the costs to the system.

But it is my third suggestion that I regard as in some ways most interesting and most important for the future. An increasingly regulated welfare state generates an enormous amount of litigation. The programs may have great social importance but the issues presented are in large measure legal trivia. Nevertheless, we have thoughtlessly moved this mass of litigation into the federal courts, without regard to whether it belongs there or what we are doing to those courts.

We ought to consider an entirely new set of tribunals that would take over completely litigation in a variety of areas where

an Article III court is realistically not required. Criteria for making that judgment would include: (1) the disposition of cases in the category turns upon the resolution of repetitious factual issues; and (2) the category of cases consumes a large amount of Article III judicial resources. I am trying to describe cases that can be handled as justly by a person resembling an administrative law judge as an Article III judge.

The categories of cases I have in mind might include those rising under the Social Securities laws, the National Environmental Policy Act, many prisoners' suits, the Clean Air Act, the Water Pollution Control Act, the Consumer Products Safety Act, the Truth in Lending Act, the Federal Employers' Liability Act, and the Food Stamp Act. Other examples can be found. I suspect that cases under the Mine Safety Act and the Occupational Safety and Health Act would qualify. It should be noted that some of the regulatory schemes, though not legally complex, produce masses of paperwork that require an extraordinary amount of judicial time in each case. Often the assessment of such materials can be done by someone far less qualified than a judge.

If these categories of cases were removed from the federal district courts, their dockets would be relieved of well over 20,000 cases, and, because our figures are still incomplete, perhaps well over 30,000 cases. If diversity jurisdiction were also abolished, it appears that district court dockets could be lightened by over 40 percent. More important, the future growth of those dockets could be made manageable if Congress would place factual disputes arising under new regulatory and welfare programs in these tribunals.

Because of constitutional questions, I am at the moment unsure whether these new tribunals could be Article I courts or, whether they would have to be specialized Article III courts. Let me assume for the moment that they could be Article I courts, which, for various reasons, might be preferable. In that case, the system envisaged would work roughly like this.

There would be a trial division from which appeals would be funneled to an appellate administrative court, and the litigation would end there. There would be no access to an Article III court unless an important question of statutory construction or

constitutional law was raised, and only the legal question could be certified to the Article III court.[2] Since access to Article III courts for statutory and constitutional issues would be preserved, we would preserve the systems' ability to respond to claims of human rights.

Note that this plan avoids one of the major pitfalls in proposals for specialized courts, for these tribunals would not be specialized by a single subject matter. In the range of types of cases they would handle, they would have many of the advantages of generalist courts. They could, moreover, provide significant advantages for litigants by speeding decision and cutting the expense of litigation. Many classes of cases could be handled informally, without counsel, unless the claimant desired an attorney, giving some of the hoped-for advantages of small claims courts. This would vary. Some cases might require rigorous procedural and evidentiary rules as well as the assistance of counsel, but that degree of rigor could perhaps be dispensed with, for example, in the ordinary Social Security disability case.

These are the major suggestions that will be under consideration. We would very much appreciate your comments upon them and any ideas you may have to cure judicial overload before it reaches intolerable levels. The federal courts, as Judge Higginbotham so eloquently reminded us, have been an extraordinary national asset. It is worth an extraordinary effort to save them.

ATTACHMENT IV

THE WALL STREET JOURNAL THURSDAY, SEPTEMBER 24, 1987

Foreign Policy, Original Intent and Judge Bork

By ARTHUR SCHLESINGER JR.

"Original intent," Judge Robert Bork tells us, "is the only legitimate basis for constitutional decision." The proposition at first glance sounds plausible. But questions quickly arise. Can it even be shown, for example, that it was the original intent of the Framers that their own original intent should govern subsequent interpretations of the document they framed?

If this indeed had been their original intent, they would obviously have provided a full record of the Constitutional Convention and made it available at once. Instead of doing this, they kept the proceedings secret at the time and for many years thereafter. The best record, that made by James Madison, was not published till 1840—more than half a century after the Convention. And Madison's notes are far from complete. James H. Hutson, chief of the Manuscript Division of the Library of Congress and a notable constitutional scholar, calculates that Madison could take down only about 600 of the 8,400 or so words uttered every hour—about 7% of each hour's discussion. If we cannot know what the Framers said, how can we know what they intended?

Disagreed Among Themselves

During the half-century before the publication of Madison's notes, the Supreme Court made its decisions without benefit of original intent. This did not bother the court or anybody else. "What can a history of the Constitution avail toward interpreting its provisions?" asked Gouverneur Morris, the chief author of the document. "This must be done by comparing the plain import of the words with the general tenor and object of the instrument."

Not only did the Framers place far less value on original intent than Judge Bork does but they disagreed vehemently among themselves over their own original intent. James Madison and Alexander Hamilton played leading roles in the Convention and collaborated thereafter in writing the Federalist Papers, the authoritative gloss on the new Constitution. What two men better qualified to say what the sacred document "really" meant? Yet within half a dozen years after the Convention these two authorities were engaged in bitter controversy over the constitutional allocation of powers in both domestic and foreign policy. If the original intenders quarreled among themselves about the meaning of the Constitution, aren't Judge Bork and Attorney General Edwin Meese a trifle arrogant to claim two centuries later that the truth about the original intent of the Framers has been revealed to them?

It is reasonable to assume that when the Framers wanted to be restrictive, they were specific (no person can be elected president until he has attained the age of 35) and that when they wanted to be flexible, they were general. The absence of specification in such phrases as general welfare, regulation of commerce, due process, the "necessary and proper" clause and so on constitutes the Framers' clear invitation to posterity to measure the application by the needs of later days. Judge Bork's admirers place him in the school of Felix Frankfurter; but it was Frankfurter who wrote of these phrases that "their ambiguity is such that the Court is compelled to put meaning into the Constitution, not to take it out."

Judge Bork is too intelligent to deny these obvious points. "Courts," he has written, "must not hesitate to apply old values to new circumstances." The question is fidelity not to the text of the Constitution but to what Judge Bork calls the document's "core values." But Judge Bork has no monopoly on these core values. Ev-

ery Supreme Court justice interprets the Constitution in terms of his own understanding of the core values. Justice Douglas in the case of the Connecticut law banning contraception saw privacy as a core value; Judge Bork rejects it as a core value. There is no way that Judge Bork can demonstrate that he is right and Douglas wrong.

Yet he continues to insist that he has the inside track – that he knows better than Douglas, and no doubt better than Madison and Hamilton, what the Framers really intended. But Judge Bork is not a close reasoner nor much of a constitutional scholar. Thus he writes magisterially, "If judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge." I would like Judge Bork to show me the specific clause of the Constitution conferring on the Supreme Court the power of judicial review.

Judge Bork reminds one of those dogmatic, right-wing eccentrics encountered on college campuses who like to tease and provoke, and make stimulating teachers and affable colleagues. But there is something basically frivolous about his approach to constitutional interpretation. He loftily rebukes other justices for succumbing to their "moral predilections"; then identifies his own moral predilections with the intent of the Framers. His bias is unconcealed: for business against regulatory government, consumers, women, minorities; for majoritarian government against civil liberties; for the executive against Congress.

This last category shows what a faker this apostle of original intent is. If the original intent of the Framers is indisputable on any point, it is on the allocation of the vital powers in international affairs to Congress. Article I of the new Constitution gave Congress not only the exclusive appropriations power—itself a potent instrument of control—but the exclusive power to declare war, to raise and support the Army and Navy and to grant letters of marque and reprisal, this last provision enabling Congress to authorize limited as well as complete war. Even Hamilton, the Convention's foremost champion of executive energy, endorsed this allocation of powers. "The history of human conduct," he wrote in the 75th Federalist, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of . . . a President of the United States."

Is Judge Bork respectful of original intent when it comes to the executive and foreign policy? Are you kidding? As Rep. Barney Frank of Massachusetts has well said, "No judge sitting on a federal circuit court has been more diligent and determined than Robert Bork in seeking to prevent judicial review of executive-branch actions in foreign policy." He tries to make foreign policy an exclusive executive prerogative by denying Congress standing in the courts, by denying the justiciability of cases and by invoking the "political questions" doctrine. His general position appears to be that actions undertaken by the president in foreign policy should be immune to judicial review. On the Supreme Court, should he end up there, he can be counted on to oppose legislative restraints on the president's claim to unilateral power in foreign affairs.

His Final Statement

Now a case can be made for these Bork positions. But that case cannot possibly be made by an apostle, as Bork professes to be, of original intent. In his final statement to the Judiciary Committee Bork made a ringing affirmation of "the need for faithful adherence to the text and the discernible intentions of the ratifiers of the Constitution." Does he really think that it was the intention of men who had been fighting the arbitrary authority of the British king to give predominant power in foreign affairs to the president? Does he really think that this is what the text of the Constitution says? Judge Bork's belief in the constitutional dominance of the president in foreign policy is irreconcilable with his doctrine of original intent.

Judge Bork is a rather confused fellow, given to facile and pretentious verbalizing in the service of illiberal ends. He would hardly seem what the republic requires on the Supreme Court at this moment in its history.

Mr. Schlesinger is Albert Schweitzer professor of the humanities at the City University of New York and a winner of Pulitzer Prizes in history and biography.

ATTACHMENT V

Forum

New York Times,
August 23, 1987

ROBERT BORK AND BUSINESS

A Man of Two Clashing Principles

By RICHARD A. EPSTEIN

TWENTY years ago in my corporations class at the Yale Law School, the late Prof. Joseph Bishop wryly commented: "If someone proposed a law that guaranteed substantial wage increases for law professors, I'd be first in line to lobby for it, but not Bob Bork. He's a man of principle." That single observation explains why Judge Bork has proved so difficult for both supporters and detractors to understand. In an age of cynical self-interest, Judge Bork cares deeply about principle.

The key to understanding Judge Bork is that he believes deeply in two kinds of principles, one of social policy and one of constitutional interpretation, but has not fully resolved the tension between them.

This tension is manifest in his attitude toward business issues. As a matter of social policy, Judge Bork is an unabashed champion of the proposition that competitive markets are the best way to achieve consumer welfare. Starting from that assumption he regards legal barriers to entry into markets as the ultimate abuse of government power. Somewhat more cautiously he would use the antitrust law to limit private monopoly practices, most notably the formation of cartels and industrywide price fixing.

Judge Bork parts company, however, from the standard liberal analysis by insisting that many trade practices, such as resale price maintenance and tie-in sales, have been wrongly condemned as monopolistic when their actual effect is to improve the operation of competitive markets. His views on these issues have been deservedly influential, not only in the Justice Department, but in academic circles as well, where they are today in the ascendancy.

It would, however, be a mistake to think that Judge Bork's judicial approach to business issues would be driven solely by his devotion to competitive markets. Judge Bork's constitutional outlook is decidedly more skeptical and deferential. Much influenced by the thinking of his late Yale colleague, Alexander Bickel — a liberal democrat and judicial conservative — Judge Bork believes that in a democratic society the essential decisions about economic matters should be made by legislatures and not courts. His insistence that courts strike down statutes only when they clearly conflict with the Constitution does not stem from his basic sympathy with the underlying legislation: He would uphold antitrust legislation that he regards as wildly misdirected. Rather, for Judge Bork the central question is that of judicial authority as it fits into the general system of political governance. Unelected

judges must stick close to the text of the Constitution lest they impose their arbitrary will upon the public at large.

JUDGE Bork's conception of the judicial role has complex implications. He will never take a statute of modest proportions and use it to impose substantial restrictions on market behavior. No special business interest can expect a cordial reception from him. But where statutory language is loose, as with the antitrust statutes, it is undeniable that Judge Bork's basic orientation will influence his thinking on close cases, as it should with all distinguished and able judges.

On constitutional matters, the issue is yet more difficult, as Judge Bork's libertarian and market impulses collide with his belief in judicial restraint. Yet judicial restraint does not mean that all statutes are constitutional solely because they are passed in proper form. The Constitution does contain explicit protections of private property and private contracts, and the more general guarantee that no person shall be deprived of life, liberty or property without due process of law. These may have some bite. The question is, how much?

On the Federal Court of Appeals for the District of Columbia, Judge Bork has not been able to escape these tensions. His most important decision has been Jersey Central Power and Light Co. v. the Federal Energy Regulatory Commission. The issue was whether a public utility was entitled to include in its rate base reasonable and prudent expenditures that it incurred to construct a nuclear power plant when the construction of the plant had to be abandoned. The commission took the hard line that the courts could set aside its rate order only if the rates set would drive the utility into bankruptcy. Judge Bork rejected that position.

Lurking within these technical rate-base determinations are questions of vital constitutional importance. Utility rate regulation has traditionally been justified as a way to prevent natural monopolists from gouging their customers. Yet regulation itself holds out the prospect of de facto confiscation of shareholder capital if the utility's rates are insufficient to allow it to maintain financial stability and to attract capital. Judge Bork's rejection of the commission's positon properly forced the utility's customers to share the costs of the plant with its shareholders just as they would have shared in the benefits had the plant been completed.

CONSTITUTIONAL questions about economic liberties will frequently confront Judge Bork if elevated to the Supreme Court. The current constitutional protection of property rights has been sorely lacking on such important matters as land use control, rent control and retroactive economic legislation. It is possible, therefore, that Judge Bork may yet again overcome his natural inclination toward judicial restraint as he did in Jersey Central.

On this issue, ironically, Judge Bork's position may in the end not differ substantially from that of former Justice Lewis Powell, with whom Judge Bork has been sharply contrasted both on attitude and substance. Justice Powell, like Justice Antonin Scalia, voted in favor of the property owner in each of the three major economic liberties cases before the Court last term.

In one, both joined Chief Justice William H. Rehnquist's dissent, which argued that the state had to pay just compensation to "regulate" away a coal company's rights to freely mine coal when the surface owner had expressly agreed to take the risk of cave-in or subsidence. Here the dissenters were the defenders of economic liberties of a relatively strict constitutional construction and an adherence to Supreme Court precedent — given a virtually indistinguishable Holmes decision gutted by the Court's majority.

The coal case points up the uneasiness between Judge Bork's judicial restraint and constitutional texturalism. When all is said and done, the reconciliation of state with individual liberty and private property is the question of constitutional law, for business and for everyone else, as well. Judge Bork surely doesn't have all the answers to so profound an inquiry. But he does have the intellectual power and tenacity of mind to enrich both the public debate and the Supreme Court's jurisprudence.

Richard A. Epstein is James Parker Hall professor of law at the University of Chicago.

ATTACHMENT VI

LEGAL TIMES • SEPTEMBER 14, 1987

COMMENTARY

Activism for Landowners?

Court Expands 'Takings' Clause

BY JONATHAN SALLET

Two recent land-use cases decided by the Supreme Court established the past term as the most protective of property rights in recent memory. At a time when some think a change in the membership of the Supreme Court will decrease the Court's concern for some individual rights, this Court may be on the verge of reconstitutionalizing doctrines of economic protectionism rejected by the Court a half-century ago.

Of the two cases, the holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* has provoked more discussion. There, the Supreme Court held for the first time that a local government that bars all use of property for a temporary period must pay the affected landowner monetary compensation for the period of time between the effective date of the regulation and the date when a court holds that the property has, in fact, been "taken."

Much of the Court's reasoning is not novel. The "takings" clause of the Fifth Amendment has long been thought to apply to governmental action that restricts the use of property as well as to formal condemnation actions in which a government files suit to acquire formal title to property.

In a leading case, the Supreme Court held in 1946 that the U.S. government had "taken" an interest in a chicken farm because military aircraft flying low above the farm caused physical and emotional harm to the chickens residing below. The Court also has consistently recognized that "just compensation" must be paid when property has been taken.

Never before, however, had the Court asserted that a local government could be liable for monetary compensation accruing before a court determined whether, in fact, a land-use regulation had "taken" property.

In my view, the Supreme Court has gotten this one wrong. As Justice John Paul Stevens makes plain in dissent, a short moratorium may have little impact on property, like real estate, that can be used for a long time after the temporary measure is lifted. And, as Justice Stevens also points out, the majority disregards the Court's earlier holding that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay" do not constitute a taking.

Whatever one's views of the merits of the Court's reasoning in *First English Evangelical Lutheran Church*, however, the decision undeniably creates the possibility that local communities may face significant monetary liability if they fail to predict accurately whether their land-use law has "taken" property. Indeed, in the aftermath of the decision, representatives of local governments expressed the fear that legitimate land-use efforts might be deterred by the prospect that governments would be held monetarily liable to owners and developers of affected property.

The long-term impact of the decision cannot be discerned solely from the opinion itself, however, because the Court was careful to note possible limitations on its use of land to such a degree that a "taking" occurs?

On the last day of the term, the Supreme Court held that such a law had gone too far and, in so doing, lessened the chance that *First English Evangelical Lutheran Church* would have only limited impact.

In *Nollan v. California Coastal Commission*, the Court ruled that a state governmental agency could not require landowners to give the public access over a small portion of their property, which lies between two public beaches, in return for the issuance of a construction permit to build larger houses on their property.

The Court, in an opinion written by Justice Antonin Scalia, held that an easement on that property had been "taken" because the condition attached to issuance of

the permit failed to advance the governmental goal of maintaining the public's visual and psychological access to the public beaches. Four members of the Court—Justices William Brennan Jr., Thurgood Marshall, Harry Blackmun, and Stevens—dissented.

Two basic flaws appear in the Court's holding. The majority opinion left open the possibility that the ordinance could be justified as a safety regulation, and it expressly noted that "quite different questions" would arise "in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like."

Yet the most significant potential limitation concerned the Court's discussion of whether a taking had in fact occurred. The Court said, in essence, that it had merely accepted as true the landowner's allegation of a taking but that it did not address that issue on its merits.

An Open Question

That question is of critical importance, for the finding that property rights have been "taken" now triggers the duty to pay monetary compensation. The second significant land-use decision from this term addressed that open question: When does regulation infringe on a property owner's reasoning.

First, the state agency did not compel the landowners to surrender anything. Compare, for example, the facts alleged in *First English Evangelical Lutheran Church* with the facts of *Nollan*.

In the former case, the government issued an unequivocal mandate barring use of land; in the latter, it merely created a condition that would come into effect if the landowners chose to take the specified action of building a house of particular dimensions on their beach-front lot. Similarly, the landowner in *First English Evangelical Lutheran Church* alleged that financial damages occurred because it could not use its property. By contrast, the Court in *Nollan* failed to identify the existence or extent of economic injury that would result from the public-access requirement.

Second, the Court revamped the standard for deciding whether a governmental action is constitutional. It is undisputed that a government cannot avoid constitutional scrutiny merely by transforming governmental restrictions into conditions. So, for example, a city could not condition issuance of a building permit on the "condition" that the landowner restrict access to his property only to white Anglo-Saxon Protestants.

But the condition at issue in *Nollan* concerned economic rights and, since New Deal days, the Supreme Court has found economic regulation constitutional so long as it is rational. Indeed, the Court's adoption of this relaxed "rational relationship" standard marked the end of a period in which the Supreme Court had emphasized the right to be free from economic regulation. This celebration of economic rights reached its zenith in *Lochner v. New York*, in which the Court struck down a statute limiting the work week of bakery employees to 60 hours because it infringed on the bakers' "independence of judgment and of action."

Rational-Basis Standard Refused

To lawyers, and to the general public as well, the *Lochner* case has come to exemplify a discredited era during which the Court used doctrines of substantive due process to strike down laws regulating economic conditions.

Justice Scalia, joined by Chief Justice William Rehnquist and Justices Byron White, Lewis Powell, and Sandra Day O'Connor, expressly refused to apply the rational-basis standard in *Nollan*, opting instead to ask whether the regulation substantially advanced the governmental interest.

The argument over the formulation of the constitutional inquiry may sound like semantical nitpicking. But the Court's answer—that the interest of the state in preserving public access to beaches bears no relation to the ability of the public to reach those beaches—invites the federal courts to scrutinize and overturn economic regulation of property with renewed vigor.

In other words, these two decisions are activist rulings that will hamper the promulgation of legitimate land-use regulations and will obstruct attempts by local governments to preserve our environment.

Flaws in a constitutional ruling cannot be discerned, of course, merely by reciting the adverse consequences they create. The Constitution sometimes requires results that are unfortunate from a political or social viewpoint. Here, however, the Court has reached broadly for a result and, in so doing, has shrugged off constitutional constraints that have been the hallmark of the modern Supreme Court. Perhaps the Court's willingness to revert to *Lochnerian* reasoning is aberrational and does not mark a return to constitutional doctrine discarded a half-century ago. □

Jonathan Sallet is a partner at Miller, Cassidy, Larroca & Lewin in Washington, D.C.

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October 1, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Biden:

The Nation Institute is a non-profit private foundation that sponsors research, conferences, and other projects on civil rights, civil liberties, and public policy issues. Since 1984, the Institute's Supreme Court Watch project has monitored the record of potential and actual nominees to the Supreme Court; it provides this information to the press, public interest groups, and the Senate to foster a more informed debate on Supreme Court appointments. Most recently, we testified on the civil liberties record of Antonin Scalia at his confirmation hearings last summer.

This year we have prepared an extensive analysis of the record of Robert H. Bork, which is enclosed here; I ask that this analysis, "The Bork Report," be included as written testimony in the record of the Committee's hearings on the nomination of Judge Bork to the Supreme Court.

The report is a comprehensive study of Judge Bork's writings, judicial opinions, and speeches on eleven crucial areas of constitutional law. On the basis of this research, the report concludes that Judge Bork's constitutional views are extreme and "overwhelm common sense and our common heritage." It also discusses Judge Bork's neutral approach to judging and finds that it is truly an "abdication of the responsibility to judge."

In an introductory essay, Stephen Gillers, Professor of Law at New York University Law School and Supreme Court Watch board member, details Judge Bork's attempts to distance himself from his positions in such areas as civil rights, the First Amendment, and federal court jurisdiction. Professor Gillers outlines Judge Bork's tailoring of his views during his two previous confirmation hearings. Writing before the current hearings began, Gillers presciently states, "whatever concessions or denials Bork may feel constrained to offer the Senate Judiciary Committee at this critical time, we think the record justifies extreme skepticism about their accuracy."

Thank you for your consideration.

Sincerely,

Emily H. Sack
Executive Director
The Nation Institute

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THE BORK REPORT

The Supreme Court Watch Project's
Analysis of the Record of Judge Robert H. Bork

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ACKNOWLEDGEMENTS

The Bork Report is copyrighted © 1987 by The Nation Institute, which takes full responsibility for its contents. This report benefitted from the participation of numerous individuals in the research, analysis, and editing stages. This involvement, however, does not necessarily constitute an endorsement of the final document.

For their efforts on the body of the report, "The Record", we would like to thank: D. Scott Barash, Laurence W. Bates, Amy Corton, Nancy DiFrancesco, Leon Friedman, Stephen Gillers, Anita Hodgkiss, Nicholas C. Howson, Jon Kaplon, Janet Kleeman, Mary Rose O'Connell, Joshua Rabinowitz, Carol Salem, Herman Schwartz, Dennis Selby, and Daniel C. Wing.

We are also grateful to Stephen Gillers for his contribution of the introductory essay. We are particularly indebted to Anita Hodgkiss, the Robert Masur Fellow in Civil Liberties at The Nation Institute, whc, in addition to contributing to the body of the report, undertook the enormous task of integrating and editing it in its final stages.

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THE COMPELLING CASE AGAINST ROBERT BORK

The Senate must reject the nomination of Robert H. Bork to be an Associate Justice on the Supreme Court of the United States. The body of this report offers a scholarly and comprehensive analysis of Bork's views on the Constitution, on the role of the Court in the American system of government, and on civil liberties and civil rights issues. In separate sections, the report reviews Bork's record in the following areas of the law: freedom of speech, discrimination, privacy rights, entitlements, the Freedom of Information Act, occupational health and environmental regulation, criminal law, special prosecutors, foreign affairs, separation of powers, and access to the courts. This introductory essay will explain why Judge Bork's views and history will require the Senate to reject him. It also describes the criteria we have used in reaching that conclusion.

The case for rejection is compelling. It rests on six grounds. Four of these address Bork's positions on constitutional issues of great moment to Americans, especially minorities, women, the poor and the weak, who look to the courts, and ultimately the Supreme Court, to safeguard their liberties and their equality under law. A fifth ground, complementary to the first four, rests on Bork's judicial philosophy, in particular his view of the judge's task in interpreting the Constitution. The last ground cites Bork's conduct, as Acting Attorney General,

in firing Special Prosecutor Archibald Cox at the direction of President Nixon.

Other grounds for opposition have been argued. We find it unnecessary to go beyond the six discussed here. Substantial evidence supports each of them. Each is disturbing taken alone. Cumulatively, they fully establish the nominee's unsuitability and require rejection.

THE CRITERIA USED

In this section we describe the criteria we urge the Senate to use in determining Judge Bork's suitability for the Supreme Court. We list three: Bork's position on important constitutional issues; Bork's judicial philosophy, which is the best predictor of the way he will interpret the Constitution; and Bork's character. Following our discussion of these criteria, we apply each. Parts I-IV analyze Bork's views in four important constitutional areas -- race, privacy and equal protection, freedom of speech, and congressional control of the Supreme Court's jurisdiction. Part V moves to our second criterion and analyzes Bork's judicial philosophy. Part VI discusses Bork's role in Watergate and what it reveals about his character.

A. Criterion One: Is the Nominee In the Constitutional Mainstream?

One hundred and one men and women participate in the nomination and confirmation of a Supreme Court Justice. If each conditioned approval on the nominee's proven adherence to a given

position on particular constitutional issues, only the most inscrutable candidates would stand a good chance of confirmation. Compromise is inevitable. The President nominates and, assuming competence and honesty, in our history (and especially in our century) the Senate, whether controlled by the same or an opposing party, has accepted nominees with a wide range of views about the meaning of the Constitution and the role of the Court. A wide range, but not an unlimited one.

Our Constitution is, and must be, constantly reinterpreted as new legal issues arise or old ones return in new contexts. In its 200 years, the text of the Constitution has changed comparatively little, but its meaning has changed often and dramatically. All American citizens and institutions are invited to participate in that interpretive process. Each of us can be part of the constant, shifting and robust debate over the meaning of our supreme law. It is a debate that never ends, but from time to time the courts, and finally the Supreme Court, must resolve particular questions. Some resolutions are masterstrokes and endure for decades, even centuries. Others are quickly cut back, sometimes reversed altogether, within a year or two. It is proof of our collective participation in the great debate over the meaning of the Constitution that even a Supreme Court decision on a constitutional issue need not, and often does not, end the public argument over it. It may even intensify it. Many times

in our history, the Court has been "overruled" by this popular debate, with the Court eventually revising or reversing itself.

Much constitutional language is general and subject to various possible meanings. Yet other meanings are impossible. They are impossible not because the words of the document are linguistically incapable of receiving those meanings, but because the meanings are politically impossible. For example, in 1954, the Supreme Court interpreted the Equal Protection Clause of the Constitution to forbid racially segregated public schools. Before then, the Clause had been interpreted not to forbid such schools. The language of the Clause did not change. Its interpretation did. Immediately after the decision in Brown, many argued that its interpretation was wrong. As time went by, fewer and fewer people made that argument. Today, though some still reject Brown's interpretation of the Equal Protection Clause, mainly based on historical arguments, that view is no longer politically possible. Anyone who seriously urged the Supreme Court to reverse Brown would be considered beyond the pale so far as the acceptable interpretation of the Constitution is concerned.

It is not easy to separate the constitutional mainstream -- the range of the politically acceptable in constitutional interpretation -- from the nether areas that are beyond the pale. For purposes of the continuing constitutional debate in which we, as a people, are all engaged, it does not much matter where we draw the line. But the views of a Supreme

Court Justice on the proper interpretation of a constitutional provision, including the Court's place in our system of government, do matter. His views, with those of his colleagues, will determine the legal rules for all the rest of us. The appointment process is the first and last chance the people, through their Senators, have to identify whether a nominee's views are within the constitutional mainstream, generously defined, or beyond it. The Senate's great constitutional duty in giving its advice and consent to the President's nominee lies in making that identification correctly.

Our first criterion, then, in evaluating the qualifications of Judge Bork to be an Associate Justice of the Supreme Court is this: Can we (can the Senate) confidently say that Judge Bork is within the mainstream in the important areas of consitutional jurisprudence that inevitably will come before him on the Supreme Court? Our answer is no.

B. Criterion Two: What Is the Nominee's Judicial Philosophy?

We use two other criteria in evaluating Judge Bork's qualifications. The second of our three criteria inquires of Judge Bork's judicial philosophy and, as such, derives from the first. As Judge Bork has recognized, there is a good deal of debate in progress among constitutional scholars and others about the proper interpretive theory a judge should employ in attempting to identify the meaning of constitutional provisions.

Judge Bork has joined this debate in his academic and popular writings and in opinions.

The Senate does not have to enter into this debate. As we shall show in Part V, Judge Bork's approach to constitutional interpretation is extreme. He is willing to disown all reliance on moral philosophy and moral reasoning as he goes about attempting to identify constitutional values. We shall show that the consequences of his morally-bereft view of the judge's role are opinions that reject substantial portions of our heritage of freedom and that are blind to the guarantees in our Bill of Rights. In short, Judge Bork's judicial philosophy leads to an abdication of judicial responsibility.

C. Criterion Three: Character

Our third criterion in judging the Bork nomination is of a different order. It is a criterion that is beyond dispute -- the character and probity of the nominee. The Senate must assess these. The facts surrounding Bork's termination of Archibald Cox, and his subsequent and inconsistent explanation of these facts, disqualify him for a seat on the Court. Bork appears to have acted improperly in firing Cox and disingenuously in explaining his conduct.

I. JUDGE BORK ON RACE

Robert Bork has attempted to retract his strident opposition

to civil rights legislation of the early 1960s. For many reasons, his retraction is unpersuasive.

Bork's opposition to the Interstate Public Accommodations Act of 1964, which forbids racial discrimination by owners of motels, hotels, restaurants and other places of public accommodation engaged in interstate commerce, rested on several arguments. All are startling. In 1963, Bork wrote in The New Republic that it would deny the owners of business establishments "personal liberty" to require them to serve persons of all races.[1] This argument applies whether the source of the requirement is the federal, state or local government. Government was to do nothing, at least nothing mandatory, to assure that blacks and other minority group members receive equal treatment in hotels and restaurants. Bork opposed such legislation from any source because by it the legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. This insistence restricted the "freedom" of the tradespeople.

Bork considered the argument that it was acceptable to limit freedom to that extent because "it is irrational to choose associates on the basis of racial characteristics". Bork questioned whether such a choice could be called irrational. "Behind that judgment," he wrote, "lies an unexpressed natural-

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[1] Bork, "Civil Rights -- A Challenge"; The New Republic, August 31, 1963, p. 21.

law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences." That imposition was unacceptable to Bork, even if the "coerced scale of preferences is said to be rooted in a moral order," because it would "not alter the impact upon freedom."

Bork has emphasized that judges must not refer to morality when applying constitutional values. In 1963, he also opposed allowing legislative majorities to employ moral standards in passing laws against racial discrimination. "In a society that purports to value freedom as an end in itself," he wrote, "the simple argument from morality to law can [be a] dangerous non-sequitur."

Bork would not even agree to the correctness of the majority's moral choice -- its "scale of preferences," as he called it. He wrote only that this scale was "said to be rooted in a moral order." (Emphasis added.) And though Bork wrote that of "the ugliness of racial discrimination there need be no argument," even here he pulled back, first adding parenthetically that "there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation," and concluding that "coerc[ing]" others into "more righteous paths" (i.e. tradespeople into non-discriminatory behavior) "is itself a principle of unsurpassed ugliness."

Responding to criticism of these views, Bork wrote that strong feeling about the wrongness of racial prejudice is not

a principled justification for a law that will "sacrifice [the] freedom of the discriminators."[2] He explained that a "principle is required because a society which values freedom as well as democracy must face the task of defining those aspects of life in which the majority may properly coerce the individual through law..." The majority's own "preferences (read 'intense moral convictions,' if you like)" are not enough. "That would make numbers and strength of passion the sole principles of legislation." Bork asserted that the "proposed legislation ...represents...an extraordinary incursion into individual freedom [and ought to be] regarded as improper."

In addition to his opposition to the Public Accommodations Act and other civil rights legislation (including laws against discrimination in employment which, Bork wrote in 1964, "even outlaws discrimination by reason of sex"),[3] based on arguments from principle, Bork also opposed the laws because he doubted congressional power to enact them and because he believed enforcement would be "impossible," thereby encouraging "disrespect for law and loss of faith in peaceful solutions to" the problems they addressed.[4]

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[2]Bork, "Correspondence", The New Republic, September 21, 1963, p. 36.

[3]Bork, "Against the Bill", The Chicago Tribune, March 1, 1964, p.1, col.1.

[4]Id.

In 1973, at hearings on his confirmation to be Solicitor General of the United States, Bork was asked about his decade-old views of federal civil rights laws as expressed in The New Republic article. He replied:

> I should say that I no longer agree with that article and I have some other articles I no longer agree with. That happens to be one of them. The reason I do not agree with that article, it seems to me that I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problems with the statue, and were that to be proposed today I would support it.[a]

This is not the only retraction Bork has felt compelled to offer to a Senate Committee reviewing his nomination to an important government post. He has done the same with regard to published views on the First Amendment.[b] In each case, Bork's retraction is completely inadequate. Bork's retraction of his views on the civil rights acts speaks to only one of the three grounds of opposition -- that the statute would be "impossible" to enforce. At the hearings, Bork recognized that "the statute has worked very well." But in 1963 and 1964, Bork opposed these laws at great length as a matter of principle. The principle was that strong moral opposition to another person's discriminatory conduct was insufficient to allow a legislative majority to prohibit that conduct. Bork has not retracted his principled

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[a] Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General, Hearings before the Senate Comm. on the Judiciary, 93rd Congress, 1st Sess. 14-15 (1973).

[b] See infra pp. xxv-xxix.

ground for opposing the civil rights acts. Nor has he conceded that legislative majorities act properly when they rely on moral repugnance as a basis for limiting the "freedom" of tradespeople who wish to discriminate against racial minorities.

Does Bork continue to believe that a majority's "scale of preferences" with regard to racial bias cannot justify laws that would "coerce" others to treat customers equally without regard to race? Does he still believe that such laws reflect "a principle of unsurpassed ugliness?" Whatever concessions or denials Bork may feel constrained to offer the Senate Judiciary Committee at this critical time, we think the record justifies extreme skepticism about their accuracy. First, Bork has never seen fit to withdraw his earlier arguments from principle (as opposed to those based on pragmatism) in the 24 years since he first advanced these. Second, Bork's other pronouncements on issues of great moment to minority groups (and to us all) reveal that the insensitivity to these issues first displayed in The New Republic article has not abated. We turn to these now.

In obedience to his professedly moral-free approach to constitutional interpretation,[7] Judge Bork has told us that the following cases were wrongly decided. Each of these cases bears directly on the rights and freedoms of minority group members or, if they are not directly concerned with racial issues, have a greater effect on members of those groups. We

[7] See infra at xxxix - xliii.

recognize that as a Justice, Bork would not necessarily vote to overrule each case with which he disagrees, but he has said that a judge is free to overrule constitutional precedent if he concludes that the precedent is "wrong and perhaps pernicious."[9] Over the years, Bork has used these or similar terms to describe many Supreme Court opinions. For example, he has called Katzenbach v. Morgan and Oregon v. Mitchell (see below) "very bad, indeed pernicious."[10] He has called Griswold v. Connecticut (see below) "unprincipled" and "specious."[11] He has criticized Shelley v. Kraemer (see below) as insupportable.[12] Consequently, we must assume that each of the decisions Bork has chosen for special criticism, and which are discussed in this essay, would be in jeopardy of being overruled if Bork is confirmed.

Shelley v. Kraemer holds that a court may not enforce a private agreement not to sell real property to members of a minority group.[13] The 1948 opinion concluded that even if the private parties legally entered the agreement, court enforcement

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[9] Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Congress, 2nd Sess. p. 14 (1982)(exchange between Mr. Bork and Senator Baucus).

[10] The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Congress, 1st Sess. 314 (1982).

[11] Bork, "Neutral Principles and Some First Amendment Problems", 47 Indiana Law Journal 9 (1971).

[12] Id. at 15.

[13] 334 U.S. 1 (1948).

would amount to state action in support of discrimination and, consequently, would violate the Equal Protection Clause of the Fourteenth Amendment. The result of Shelley was that private agreements to discriminate became legally useless because they were legally unenforceable. Bork has criticized Shelley. It is important to understand why, not only because of the consequences of Bork's views to minority group members but also because of what they tell us about Bork's approach to the judicial craft.

Shelley did not go so far as to prohibit judicial enforcement of all discriminatory decisions. There is assumed to be an area of personal choice where the ideal of liberty (including the right of personal association) is superior to the value of equality. Bork does not want judges to decide when equality is more important and when liberty is. "The judge cannot find in the Fourteenth Amendment or its history any choices between equality and freedom in private affairs," he has written.[13] So the judge is not to make any choice at all and must enforce the racially restrictive agreement with state power. It's all or nothing for Judge Bork. If the Fourteenth Amendment does not yield a dividing line between equality and liberty, the judge is to reject the equality claim of the excluded minority group member in favor of the "competing gratifications" of the property owner.

Judge Bork considers this result to be mandated by the requirement that judges apply morally "neutral principles" in

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[13] "Neutral Principles", supra note 10, at 16.

interpreting the Constitution. Far from morally neutral, we view Judge Bork's orientation, and its refusal to permit a judge to make a judgment about the proper balance between competing constitutional values, as morally bankrupt and shall have more to say about that approach below (see pp. xxxix - xliii). Here it is important to recall Judge Bork's unretracted argument from principle that for legislators to draw the line between liberty and equality, including through fair house laws, is an equally unacceptable intrusion on liberty. The result is that in a Borkean society, no organ of government would be available to help minority group members overcome racial bias in essential conditions of life, including housing.

If Bork's view of Shelley were to prevail, the results would be devastating to members of minority groups and others. We would have the state and federal courts excluding men and women from housing, or other commodities, because they were black, or Latino, or women, or Jews. Even assuming that there would not be so many restrictive covenants that the amount of essential goods and services available to these groups would appreciably diminish, do we want American jurists participating in a scheme, no matter how private its genesis, by which a person is denied full participation in our economy because of his or her race or gender? We think the question requires no answer. Judge Bork's rejection of the holding of Shelley v. Kraemer is astonishing and his reasons specious.

Many other Supreme Court opinions important to racial minorities would be in jeopardy under Justice Bork. We list them here. These are not insignificant opinions. Together they form the foundation for much of our civil rights edifice.

Katzenbach v. Morgan (1966) upheld congressional legislation guaranteeing the right to vote to Americans educated in Puerto Rico despite lack of fluency in English.[14] Judge Bork called the decision "pernicious."[15]

Harper v. Virginia State Board of Elections (1966) invalidated a state poll tax.[16] Judge Bork criticized it.[17]

Oregon v. Mitchell (1970) upheld congressional elimination of literacy tests for voting.[18] Judge Bork has called the decision "pernicious."[19]

Board of Regents v. Bakke (1978) recognized that race can be one actor in admission to schools of higher education as part of the school's affirmative action plan.[20] Judge Bork has written that, as a result of Bakke, the merit of the individual and the efficiency with which society accomplishes its work will be ideals submerged in a new ethos of group entitlement. It is a thoroughly bad idea, and one wishes it had not been encouraged by Bakke."[21]

Shapiro v. Thompson (1969) invalidated a state law requiring one year residence to qualify for welfare

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[14] 384 U.S. 641 (1966).

[15] Human Life Bill Testimony, supra note 9, at 314.

[16] 383 U.S. 663 (1966).

[17] Solicitor General Confirmation Hearings, supra note 5, at 17.

[18] 400 U.S. 112 (1970).

[19] Human LIfe Bill Testimony, supra note 9, at 314.

[20] 438 U. S. 112 (1978).

[21] "A Murky Future," Regulation, Sept/Oct 1978 at 39.

payments.[22] Levy v. Louisiana (1968) invalidated a state law that barred illegitimate (but not legitimate) children from suing for the wrongful death of their parents.[23] Both decisions have been criticized by Judge Bork as based on the "Justices' personal beliefs about what interests or gratifications ought to be protected."[24]

In addition to criticism of Supreme Court opinions important to minority groups, Bork has viewed the predicament of these groups in American society with a remarkable lack of generosity and realism. In a 1978 article[25] criticizing the Bakke decision, Bork cast doubt on the assumption behind the policy of affirmative action, which he called "reverse discrimination" and described this way: The assumption is that "if there is no societal discrimination, every race and ethnic group would achieve proportional representation in every field."

Put aside Bork's gross mischaracterization of the assumption behind affirmative action, for which no support is conceivably possible. Consider instead Bork's facile response to his assumed policy: "The world does not work that way. Group cultures differ and that leads to differing interests and differing talents." Bork is engaging in racial stereotyping which cannot be a basis for social policy. He is saying that because "group cultures differ" (he does not spell out how exactly), it is not necessary to attempt affirmatively to correct for past

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[22] 394 U.S. 618 (1969).

[23] 391 U.S. 68 (1968).

[24] "Neutral Principles", supra note 10, at 12.

[25] "A Murky Future", supra note 21, at 39.

discrimination because we won't be able to achieve "proportional representation everywhere" in any event. And since we will not, he adds, any argument that affirmative action is meant only to be transitional is wrong. We "will never arrive at the condition desired, and the transitional period will become permanent." Of course, Bork himself invented "the condition desired" and then dismissed affirmative action because, he concluded the "condition" could not be attained.

Bork is free to criticize affirmative action in the many forms in which it has been advanced. But it is an insult to characterize the argument of racial minorities that affirmative action should be used to correct past wrongs as nothing more than a quest for "proportional representation everywhere" and then facilely to dismiss their claim with the observation that "group cultures differ," leading to "differing interests and differing talents."

Similar cavalier sentiments appear elsewhere in Bork's writing. Arguing against the effort to find "welfare rights in the Constitution", Bork considered the proposition that "the poor and black are underrepresented politically." He called that premise "quite dubious". "The poor and the minorities have had access to the political process and have done very well through it." As an example of doing well, Bork cited "civil rights laws of all kinds."[24] Yet Bork

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[24]Bork, "The Impossibility of Finding Welfare Rights in the Constitution", 1979 Washington U.L.Q. 701.

would also uphold the poll tax and English literacy tests for voting, has stated his disagreement with the one-person one-vote rule,[27] and has opposed "civil rights acts of all kinds" as a matter of principle because they intrude on the liberty of the discriminator.

Even a casual observer of American life will quickly discern the importance of the federal judiciary, and especially the Supreme Court, in the effort to guarantee full civil rights to racial minorities, today and for the past forty years. Robert Bork, in the service of a theory of judging which sounds more like an abdication of the responsibility to judge, will threaten that valuable tradition and the important rights of its beneficiaries.

II. JUDGE BORK ON PRIVACY AND EQUAL PROTECTION FOR WOMEN AND MEN

Robert Bork's view of the Constitution requires him to reject the argument that it guarantees a right of privacy in matters of procreation and family life. As a result, he must disown more than two decades of Supreme Court decisions that apply the right to privacy. Most prominent among these is Roe v. Wade (1973), recognizing a right to elective abortion.[28] With Justice Powell's departure, the Supreme Court is now equally

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[27] "Neutral Principles", supra note 10, at 18-19. Solicitor General Confirmation Hearings, supra note 5, at 13-14.

[28] 410 U. S. 113 (1973).

divided over the extent to which, consistent with Roe, states may nevertheless regulate the performance of abortions in ways that will make the right of election guaranteed in Roe substantially more restrictive. It may even be that Justice Bork would provide the fifth vote necessary to overrule Roe entirely. The answer to that depends on Justice O'Connor, who has voted to limit Roe but has not voted to overrule it.

Judge Bork has called Roe v. Wade "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[29] Given his statement that a Justice might vote to overrule precedent he finds "wrong and perhaps pernicious,"[30] it must be assumed that as a Justice, Bork will argue that Roe should be overruled.

But it is not only Roe that will be in jeopardy before Justice Bork. He has also criticized these decisions:

> Griswold v. Connecticut (1965), which voided a state law that made it a crime for a married couple to use contraceptive devices.[31]
>
> Eisenstadt v. Baird (1972), which invalidated a state law that prevented the distribution of contraceptive devices to unmarried people.[32]
>
> Carey v. Population Services International (1977), which rejected a state law that restricted access to contraceptive devices.[33]

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[29] Human Life Bill Testimony, supra note 9, at 310.

[30] Confirmation of Federal Judges, supra note 8, at 14.

[31] 381 U. S. 479 (1965).

[32] 405 U. S. 438 (1972).

[33] 431 U.S. 678 (1977).

Bork has called the Griswold decision "specious" and "unprincipled" because it failed to conform to the theory of neutral principles.[34] He posited a situation in which an electrical company and its customer challenge a smoke pollution law because compliance with it would raise the price of power. He saw no difference between such a challenge and Griswold's challenge to the criminal law that prevented married couples from using contraceptive devices. "The cases are identical," he wrote.[35] In each case, the plaintiff is seeking a form of "gratification." Bork continued:

> Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases [i.e., reject the challenge]. It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgement embodied in the statue. That, by definition, is an inadequate basis for judicial supremacy.[36]

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[34] "Neutral Principles", supra note 10, at 9.

[35] Id. at 9-10.

[36] Id. at 10. "Neutral Principles", supra note 9 at 11.

Although these words were written in 1971, Judge Bork continues to subscribe to them. In 1986 he said: "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision."[37]

Judge Bork's wholesale rejection of a constitutional right to privacy, not just in Roe v. Wade but wherever it is employed, is beyond the pale of permissible constitutional meaning. Just as it is no longer politically possible to argue that the Equal Protection Clause will tolerate segregated public schools, it is no longer politically possible to argue that a state may dictate whether or what form of birth control a married or unmarried couple may use or whether they may use one at all. The political consensus excludes that argument as a matter of constitutional meaning. Judge Bork's adherence to it makes him an objectionable nominee to the Supreme Court as he would be were he to reject Brown v. Board of Education based on a narrow, historical reading of the Fourteenth Amendment.

Furthermore, Judge Bork's inability to see a difference between the two "gratifications" at issue in Griswold and in his hypothetical -- his equation of a litigant's objection to the costs of anti-pollution law and a married couple's objection to a law that means to govern their most intimate personal relationship -- causes one to recoil. Can it really

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[37] "Interview: Judge Robert H. Bork", Conservative Digest, Oct. 1985 at 97.

be that for constitutional purposes these two claims are "identical," as Judge Bork says? Is that how we as a people view our Constitution? Is a man who argues for the legitimacy of that equation suitable for our highest court? We think clearly not. A Justice must have a capacity for distinction and nuance far more developed than Judge Bork reveals when he equates the electrical company with the Griswold plaintiffs.

Finally, a word must be added about Judge Bork's view that the Equal Protection Clause offers no special protection to women as a group. Judge Bork believes that the Clause has "two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause."[3*]

In a 1982 speech, Judge Bork reiterated this view of the Clause when he criticized its use to "protect groups that were historically not intended to be protected by that clause." He saw such use as "nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong."[3**]

Here we see a curious and strange style of reasoning. The Equal Protection Clause may properly be extended to forbid

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[3*] "Neutral Principles", supra note 9, at 11.

[3**] Bork, "Federalism and Gentrification", Address by Judge Bork to the Federalist Society, Yale University Law School, New Haven, Ct., April 24, 1982.

egregated public schools, although its framers did not so
ntend, because the framers did intend to protect black people
enerally. But although the framers of the Clause also meant
: preserve the value of equality, the Clause cannot be
tended to offer special protection to women as a group.
tensions to unintended situations, in other words, are
ceptable and consistent with Bork's view of constitutional
terpretation. But extensions of the embedded principle of
ality to unintended groups are not. Bork explicitly so
ues elsewhere.[20] (Bork does not explain how, consistent
n his theory, the Equal Protection Clause can be extended
ond its historical origins to protect racial minorities
r than blacks, though still not women.)

These dictums have more than academic interest. The
lusion that use of the Equal Protection Clause to protect
n (or sometimes men) is nothing more than the "nationalization
rality," and therefore forbidden to judges, will lead to
verruling of numerous cases in the last sixteen years
have used the Clause to invalidate legislation that
s men and women differently. Among these cases are:
. Reed (1971),[21] which voided a law that preferred men
omen as administrators of estates; Frontiero v.

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[20] Bork, "The Constitution, Original Intent, and Economic
", 23 San Diego Law Review 828 (1986).

[21] 404 U.S. 71 (1971).

Richardson (1973),[42] which declared unconstitutional a statute that allowed servicemen to claim their wives as dependents (and enjoy certain economic benefits) but denied servicewomen the same right unless they provided half of their husband's support; Weisenberger v. Weisenfeld (1975),[43] which struck down a social security provision that provided for payments to widows but not widowers with children; Stanton v. Stanton (1975),[44] which voided a statute that established a higher age of majority for males than females, so that males were entitled to parental support for a longer period; and Kirchberg v. Feenstra (1981),[45] which struck a statute that gave husbands exclusive authority over community property. Each of these cases was decided under the Equal Protection Clause.

As with his views on constitutional privacy, Judge Bork's artificial distinctions, no matter how "neutrally" camouflaged, cannot be allowed to operate on the rights of Americans. The days when the Court would automatically defer to legislation that treated women differently, usually to their disadvantage, have passed. A nominee who maintains that the Court is obligated to return to that regime does not belong on the Supreme Court.

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[42] 411 U.S. 677 (1973).

[43] 420 U.S. 636 (1975).

[44] 421 U.S. 7 (1975).

[45] 450 U.S. 455 (1981).

III. JUDGE BORK ON THE FIRST AMENDMENT

As with his views on civil rights legislation, Judge Bork has felt compelled to retract some of his writings on the meaning of the First Amendment. As before, the retractions came as he was being considered for important government jobs. As before, the retractions are wholly insufficient to allay concern over Judge Bork's actual views.

We must set out Bork's First Amendment theory in his own words and at some length in order for the reader to appreciate the reason for concern and the inadequacy of the retractions. In his 1971 article Neutral Principles and Some First Amendment Problems, Bork wrote:

> Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.**

Later in the article, Bork wrote:

> The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed... It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection... The line drawn must ... lie between the explicitly political and all else...

** "Neutral Principles", supra note 10, at 20.

> The ... objection ...that the political-nonpolitical distinction will leave much valuable speech without constitutional protection ... is [not] troublesome. The notion that all valuable types of speech must be protected by the First Amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. This is hardly a terrible fate...[47]

These views are so hostile to First Amendment values, so antagonistic to our liberties and way of life, so at odds with long-established precedent that they alone should cause the Senate to reject the nomination were it not for Judge Bork's assertion that the views are no longer (and perhaps never were) his. But which of the views are no longer his? And it must be added, how much of the disclaimer can we credit?

In 1973, testifying at the hearings on his nomination to be Solicitor General, Senator Tunney asked Bork about the First Amendment views expressed in the Indiana article. Bork replied that the article was "a tentative and rather theoretical attempt to deal with the problem, and it starts with an attempt to pick up Professor Wechsler's concept of neutral principles and see what can be done with that concept. At the end of the article I point out that I think these are the conclusions that are required by that idea of neutral principles, but that I am not sure about the whole subject... As a professor, I am paid to speculate..."[48]

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[47] Id. at 27-28.

[48]. Solicitor General Hearings, supra note 5 at 12.

This explanation is misleading. It implies that Bork was simply trying to see where Wechsler's ideas might lead, almost as an intellectual exercise. In fact, the article is no such thing. It is a lengthy, reflective and closely-reasoned elaboration of a theory of constitutional meaning. The author's support for the theory, his effort to be persuasive about its correctness, is apparent throughout. Contrary to Bork's Senate testimony, "at the end of the article" he reaffirms his support for its content. He writes:

> These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here.[**]

He does not say that he is "not sure about the whole subject."

In the same colloquy with Senator Tunney, Bork further tried to distance himself from the Indiana article: "If you move, then, away from the concept of neutral principles and adopt some other concept those results are not required. I do think that the speech about politics, speech about government, speech about candidates, legislatures, judges and so forth, are the core of the First Amendment. That is the most important part of the First Amendment because the First Amendment is essentially about the political processes by which we govern ourselves in a representative democracy." As "you move out from there the First

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[**] "Neutral Principles", supra note 10, at 35.

Amendment's claims may still exist but certainly by the time ... they reach the area of pornography ... the claim of First Amendment protection becomes rather tenuous."[80]

But we see that even unmoored from the concept of neutral principles, Bork embraces essentially the same ideas. Political speech enjoys the most protection. Other speech "may still" enjoy First Amendment claims, but pornography, always an easy target, does not.

Bork next had an opportunity to retract the First Amendment (but not the other) views expressed in his Indiana article in 1982, when he appeared before the Senate Judiciary Committee in connection with his nomination to the Court of Appeals. In response to a question from the Chairman, Bork again misleadingly characterized the Indiana article as "an academic exercise ... a theoretical argument, which I think is what professors are expected to do."[81] (Though Bork was a law professor for fifteen years, there is no indication that he ever engaged in this kind of exercise before or since.) He then testified that "the concept of neutral principles" when applied to "the First Amendment reaches the result I suggested. On the other hand, while political speech is the core of the ... First Amendment, the Supreme Court has clearly expanded the concept well beyond that." Bork then acknowledged that as a lower court judge he

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[80] Solicitor General Hearings, supra note 5, at 12.

[81] Confirmation of Federal Judges, supra note 8, at 4.

would have to obey "what the Supreme Court has said, and not my theoretical writings."[52]

One examines this testimony in vain to discover any repudiation of the "neutral principles" concept as applied to the First Amendment (or for that matter other issues addressed in the Indiana article).

In 1984, Judge Bork replied to an article in the A.B.A. Journal that reprinted in summary form a lengthy article about him that had appeared in The Nation. He repeated the assertion that the Indiana article was merely his "tentative" views "based on an attempt to apply [Wechsler's] concept of neutral principles," then added: "As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He added that "obscenity and pornography do not fit this rationale for protection."[53]

This is simply not good enough. The First Amendment theory expounded in the Indiana article was extreme but forcefully argued. It would require the overruling of hundreds of Supreme Court decisions and deny constitutional protection to many varieties of speech that have long enjoyed it. The statement that "many other forms of discourse, such as moral and scientific

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[52] Id.

[53] "Judge Bork Replies", 70 ABA Journal 132 (1984).

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debate, are central to democratic government and deserve protection" gives not a whit of assurance that Bork has abandoned the extremist views in his Indiana article. What kind of "protection" does moral debate receive? What about artistic works? What about scholarly studies in fields outside government (and so not "political" within the meaning of the Indiana analysis?) And do other forms of speech get protection only to the extent that they are "central to democratic government?" Bork has not said.

The timing of Bork's professed disclaimers is reason to doubt their seriousness. They have come at confirmation hearings and in 1984, when Judge Bork was often mentioned as a likely Supreme Court nominee. Subsequent expressions of his First Amendment views also detract from the credibility of the disclaimers. In a May 1985 article in California Lawyer, Bork warned against judges who bring their "own values into the system." He pointed out that "there's always the problem of what level of generality you speak at." Then he gave an example using the First Amendment. He quoted the view of another person that "you had to start from political speech and move on to literature until you get all the way out to paintings, statues, dancing and so forth -- anything that's expressive is protected. That seems to me to be a level of generality which goes well beyond what the framers intended. I doubt if they intended to protect some forms of dancing from

regulation."[84] Here, 14 years later, we have an assertion that sounds very much like the theory Bork advanced in his Indiana article and which he had tried to dismiss as an "academic exercise." What protection is left once we get "all the way out to" paintings, statues, dancing and "so forth"? Bork does not say.

In September 1985, Bork made a statement wholly inconsistent with his previous Senate testimony, especially the assertion at this confirmation hearings to be Solicitor General that when he wrote the Indiana article he was "entering a field for the first time, and I was trying out a theoretical concept, if you will." Asked what books "most powerfully influenced your judicial/legal philosophy," he replied:

> What influenced it primarily was a seminar I taught with Alex Bickel in which we argued about these matters all the time. We taught it for seven years, and I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece which you probably have seen..."[85]

No retractions there; rather a reaffirmation, with the information not previously revealed to the Senate Judiciary Committees that confirmed him, that the Indiana article was the culmination of a "philosophy" "worked out" after teaching a seminar at Yale Law School for "seven years." That new information simply does not square with Bork's earlier protestations that

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[84] "Justice Robert H. Bork: judicial restraint personified", California Lawyer, May 1985, at 26 [emphasis added].

[85] Conservative Digest, supra note 37, at 101 (emphasis added).

the Indiana article merely expressed his "tentative" views and was nothing more than "an academic exercise."

By May of 1987, Bork further abandoned his Senate renunciation of his Indiana article. In an interview with Bill Moyers on public television, he said that the First Amendment protects speech that "is essential to running a republican form of government," including "speech about moral issues, speech about moral values, religion and so forth, all of those things [that] feed into the way we govern ourselves.[86]" He added that artistic speech is "towards the outer edge of the Amendment's protection."[87] Even though in this statement Bork was willing to protect moral debate along with political speech, it was not because moral debate was entitled to protection in and of itself but because it "it essential to running a republican form of government."

In the confirmation hearings on Bork's nomination to his current seat, he argued that as a lower court judge he would be required to follow the precedent of the Supreme Court, not his own theoretical writings, which he acknowledged did not reflect the law as it was. As a Supreme Court Justice, Bork will be free to elaborate a theory of the First Amendment without being bound by Supreme Court precedent. In the Indiana article Bork made a serious and sustained argument that the

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[86]"Strictly Speaking: Judge Robert Bork and Attorney General Edwin Meese" Moyers: In Search of the Constitution (PBS television broadcast, May 28 1987).

[87]Id.

free speech and free press provisions of the First Amendment should be interpreted to deny Americans protection from governmental regulation to an extent no member of the Court has advocated in more than 50 years. Since then, Bork has made weak efforts to distance himself from this article, efforts that are entirely unconvincing when measured against other of his statements to different audiences, and which, even if taken at face value, amount to modest reservations at best. The Indiana article still stands as the best evidence of Bork's First Amendment views. They are intolerable views. No person who holds them should be confirmed to sit on the Supreme Court.

IV. JUDGE BORK ON FEDERAL COURT JURISDICTION

In the last fifteen years, persons opposed to decisions of the Supreme Court in a variety of cases ranging from the constitutional right to privacy, to voting rights, to rights in the criminal process, have advocated laws that would prevent the Supreme Court, and sometimes the lower federal courts, from having the authority to hear cases raising these and other issues. These jurisdiction-stripping laws mean to "repeal" the opinions with which their advocates disagree, not by getting the Court to revise its holdings on the particular issues but by preventing the issues from ever again reaching the Supreme Court.

Many look upon the jurisdiction-stripping strategy with alarm. Followed to its natural conclusion, it would destroy the doctrine of judicial review, established by Chief Justice John Marshall in Marbury v. Madison, by enabling the Congress to "overrule" any opinion with which a majority of its members happen to disagree. Because judicial review permits the Court to assure that the guarantees of civil liberties and civil rights contained in the Bill of Rights and elsewhere in the Constitution will be respected even as against a majoritarian wish to circumvent or deny them, the jurisdiction-stripping bills threaten our very system of constitutional government. They are controversial, in short, because they would give Congress final power over the branch of government -- the judiciary -- with responsibility to assure that Congress and state officials act constitutionally.

Over the years, Bork has been asked his views of jurisdiction-stripping bills. Over the years, his answers to these questions have appeared to depend on the identity of the audience to which he was speaking and the reason for the inquiry. In other words, he has varied as much in his answers to questions in this area as he has in response to questions about his article in the Indiana Law Journal.

In his 1982 confirmation hearings, Bork was asked whether he thought it would be "unconstitutional for the Congress to attempt to remove Supreme Court jurisdiction over constitutional issues." He agreed that it would be. Asked

why he reached that conclusion, he explained that the basis for the claimed congressional power is the clause in Article III of the Constitution that gives Congress power to make "exceptions" to the Supreme Court's appellate jurisdiction. But, Bork testified, it was unlikely that the framers intended to make the "exceptions" clause so broad. If it were so broad, and Congress did attempt to remove the Court's jurisdiction on a particular controversial subject -- for example the constitutionality of a war -- the result would be to leave legal power on that issue in the state courts, with no single court capable of reconciling their various decisions.. If the framers had intended to permit the "exceptions" clause to be used to eliminate Supreme Court jurisdiction on a constitutional issue, Bork would have expected them to provide for the issue to be returned to Congress, not to the state courts.** Since they did not so provide, Bork concluded that the framers did not intend the "exceptions" clause to give Congress power to pass laws that removed the Court's jurisdiction over particular constitutional questions.

In 1985, speaking with an interviewer from Conservative Digest, Bork was asked the same questions he was asked before the Senate and was reminded, before answering, that this was an area "where some conservatives disagree with you." This time, Bork, now a judge on the Court of Appeals, gave a

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**Confirmation of Federal Judges, supra note 8, at 7.

different answer. After defining the issue in terms of the proper scope of the "exceptions" clause, Bork said:

> I must confess, although I have given an answer to that in the past, it seems to me the answer is not entirely clear for the following reason: I am clear that the exceptions clause was never designed for a use like this. If you should only use a clause for the purposes for which it was designed, then you shouldn't use it for this purpose.

Bork then repeated the substance of his Senate testimony, explaining how jurisdiction-stripping as a check on judicial power would be unhelpful where there was a need for "national uniformity." He said he further doubted that the framers would consider it an adequate "check ... against a runaway judiciary" to redirect particular cases from the Supreme Court to the state courts. But after giving that answer on the one hand, Bork added a different view on the other hand:

> Having said that, on the other side it must be said that Congress did not give the federal courts and indeed the Supreme Court certain kinds of jurisdiction for years and years and years after the Constitution was created. It's a little hard to say that Congress need not have given jurisdiction, but once having given it, may not take it away.
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> So I am a little bit in balance on this issue, and I would not want to have to decide it unless I hear arguments on both sides. On the one hand, the clause was not meant for this purpose; on the other hand, that isn't conclusive proof that it could not be used for this purpose.[=*]

These quotes are very troubling, for several reasons. First, they reveal that within three years Bork had altered the view he claimed to hold in his testimony to the Senate Committee

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[=*] Conservative Digest, supra note 37, at 97-98.

considering his nomination to the Court of Appeals. Whereas he told the Senate Committee that Congress was without power to remove the Court's jurisdiction to pass on constitutional issues, he told Conservative Digest that he is "in balance on this issue." We view with alarm the prospect of legislation that could remove the Supreme Court's power to hear cases in which a person claimed a denial of his or her constitutional rights.

Bork's statement to Conservative Digest raises a second issue. Once again Bork has managed to modify his views, in a comparatively brief time, to suit his audience. It must be said, however reluctantly, that this lack of consistency, this pragmatic inconsistency, casts grave doubt on Bork's assorted efforts to revise, disown or otherwise explain away his other inconvenient pronouncements. We find these efforts not credible.

Finally, Bork's statement to Conservative Digest tells us something else disturbing. Bork is prepared to entertain an argument that Congress may withdraw jurisdiction from the Supreme Court in constitutional cases based on the "exceptions" clause, though he acknowledges that the framers did not intend the "exceptions" clause to be used in that way. Yet Bork has repeatedly insisted that judges must interpret the Constitution's "words according to the intention of those who drafted, proposed, and ratified its provisions and its various amendments." To go beyond that and treat the constitutional language "with such a level of generality" that [the judge] "transforms

it... improperly deprives the democratic majority of its freedom."*° Bork's recognition that the framers never intended to allow Congress to use the "exceptions" clause to deprive the Supreme Court of jurisdiction to decide constitutional issues obligated him to tell the Conservative Digest (as he told the Senate) that whether or not conservatives agree with him on the issue, his theory of constitutional interpretation would not permit Congress to go beyond the framers' intent. Yet he pointedly said he was "in balance" on the subject. Surely, it was an answer the readers of Conservative Digest would appreciate. But the answer was disloyal to Bork's representations at his confirmation hearings and to his own forcefully argued judicial philosophy.

We cannot know where Judge Bork stands on the issue of congressional control of the Supreme Court's appellate jurisdiction. But we can know that he is willing to adjust his position depending on the identity of his audience and in a manner that flatly contradicts his professed view of the judge's proper role.

V. JUDGE BORK'S JUDICIAL PHILOSOPHY

Enough has been written in this essay about Bork's theory of constitutional construction not to require further elaboration here. We do not suggest that in deciding whether

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*° "The Constitution, Original Intent, and Economic Rights," supra note 40, at 827.

to confirm or reject the Bork nomination the Senate make a choice among competing judicial philosophies or theories of constitutional meaning. We concentrate here only on Bork's particular views and conclude that these are radical. They may account for his extreme positions on substantive constitutional issues and his wholesale rejection of many Supreme Court decisions protecting the rights of Americans.

This is not a contest, as some would have it, between those who want judges to "interpret" the law and those who urge an authority to "make" law. Unless only a single meaning of a constitutional phrase is possible, judges always "make" law. When multiple, competing meanings can validly be given to the same constitutional phrase, a judge, simply by choosing one defensible meaning over another one, makes law in the sense that he or she installs one legal rule rather than the other rule. The question is not whether judges interpret or make law but rather the tools they will use as they go about the business of interpreting language (most critically constitutional language). This is what the art of judging is all about.

In interpreting the Constitution, Bork condemns resort to morality on the ground that this will put the judge in the position of substituting his own values for those of the framers, a result that he says "cannot be squared with the presuppositions of a democratic society."[*1] Guided by this philosophy, Bork can see no legal difference between the claim of an electrical

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[*1] "Neutral Principles", supra note 10, at 6.

company against an antipollution law and the claim of a married couple against a statute that criminalizes their use of birth control devices (see supra at xx-xxi). This philosophy has also led Bork to find no warrant in the Equal Protection Clause to subject legislation containing gender-based distinctions to heightened scrutiny. (See supra at xxii). And this same philosophy has caused Bork to conclude that there is no way, consistent with democracy and neutral principles, for a judge to uphold the claim of a black man or woman who wants the judge to refuse to enforce a racially restrictive agreement. In order to accept such a claim, Bork has said, the judge would have to decide when equality is more important than liberty. A judge, he has argued, has no way to decide that issue based on the constitutional language. (See supra at xiii-xiv). Finally, Bork's value-free judicial philosophy has led him to conclude that the First Amendment only protects speech that is "explicitly political," and not speech that is "scientific, educational, commercial or literary." Bork has made feeble attempts to move away from this assertion, but has continued to emphasize the primacy of political speech and to recognize protection for a few other kinds of speech only to the extent they "are central to democratic government."

The moral skepticism revealed in Bork's judicial philosophy is confirmed elsewhere in his professional pronouncements. It was Bork who, in 1963, refused to concede that the "scale of preferences" of those who supported the civil rights acts could

be "rooted in a moral order." Indeed, for Bork, the freedom to discriminate was deserving of more legal protection than was the victim of the discrimination. Any effort to invade that freedom through legislation revealed a "principle of surpassed ugliness." (See supra at viii). More than two decades later, Bork opined that the "effort to create individual rights out of a general, abstract, moral philosophy, I think is doomed to failure from the beginning because I don't think there is any version of moral philosophy that can claim to be absolutely superior to all others."[42] In a 1986 article, Bork rejected the idea that judges should even be "guided by some form of moral philosophy," which he saw as "typically inadequate to the task."[43] And in the same article he described the judge's task as essentially to work out a syllogism. The Constitution provides the judge "not with a conclusion but with a major premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. Courts perform this function all the time. Indeed, it is the same function they perform when they apply a statute, a contract, a will, or indeed, a Supreme Court opinion to a situation the framers of those

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[42] "An Interview with Robert H. Bork", Judicial Notice, (reprint June 1987), at 4.

[43] "The Constitution...", supra note 40, at 825.

documents did not foresee."[**] In performing these tasks, however, reliance on moral philosophy and moral reasoning is forbidden.

One can support the idea that judges must draw the values they enforce from the Constitution and still expect that they will be able to refer to principles of moral philosophy in the wise performance of that task. The two are not incompatible. It is Bork's conclusion that they are incompatible that makes him an unsuitable Supreme Court nominee and has put him beyond the pale on important constitutional questions.

Shelley v. Kraemer, the case involving the racially restrictive covenant, provides an excellent example. The contest in Shelley was between liberty and equality. Both values are recognized in the Constitution. Upholding either would not require the judge to substitute his or her own personal morality. But Bork thinks the judge cannot even make a principled choice between these two constitutional values because he has no measure that will enable him to discover, in a case like Shelley, which value ought to prevail. Moral philosophy and moral reasoning adequately provide that measure. Their wise employment is essential to the art of judging, especially at the Supreme Court level. A refusal to use them leads to intellectual bankruptcy and judicial paralysis. This, indeed, is where Bork's analysis of Shelley took him.

[**] Id. at 826.

For Bork, a judge's job is to engage in historical, value-free detective work, which requires only that he apply a syllogism in order to discover the scope and requirements of constitutional language. This view of the judicial role may explain some of Bork's farfetched ideas, but it is not what we want or have a right to expect from a Supreme Court Justice. The framers, who made repeated reference to moral philosophy, would surely be astonished to learn that the interpretation of their remarkable document was to be pursued in a moral vacuum. Such an approach is the exact opposite of what humane judging requires. It is an abdication of judicial responsibility, not its fulfillment. Moral reasoning and the judicial role are not enemies, not in the American system of government. They are inseparable.

The poverty of Bork's approach is further revealed in his willingness to equate the Constitution with a contract, statute or will. He wrote that a judge performs the "same function" when interpreting each document. But surely we expect something different when a judge interprets our Constitution than when he or she construes a will or a contract. It is Bork's inability to appreciate that difference that is so startling. Bork's approach to constitutional interpretation is essentially mechanical. It lacks wisdom. It is unacceptable.

VI. BORK AND WATERGATE

As Acting Attorney General, Bork fired Special Prosecutor Archibald Cox, on orders from President Nixon, on October 19,

1973. Bork has defended this act by saying that the President was authorized to fire Cox, who was an employee of the Justice Department at the time, and that in any event the discharge did not interfere with the ongoing investigation of the President, which Bork authorized to continue. Bork's conclusion about the legality of the President's order was later rejected by a federal judge, but Bork is not to be faulted for mispredicting the law in this uncertain area. There are, however, two other disturbing aspects to the Watergate episode that cast doubt on Bork's fitness for the high Court.

Even if the President is otherwise authorized to fire an Executive Department employee or to instruct a supervisor of the employee to do so, that authority cannot be used to accomplish an illegal goal. To take a hypothetical case, if the President attempted to cause the discharge of a federal prosecutor in exchange for a bribe from a man the prosecutor was aggressively investigating, the President would be acting illegally, even if he would otherwise have had authority to fire the prosecutor. Any lawyer who carried out the President's goal when he knew or should have known about the President's illegal purpose, would at the very least be acting unethically and, depending on the state of his knowledge, might also be guilty of a crime.

Cox was fired after he had won an appeal in the Court of Appeals (the court on which Bork now sits) requiring the President to deliver secret tape recordings to a lower court in

response to a subpoena from Cox's office. After this victory, the President instructed Cox to drop his effort to get the tapes. Cox refused. The President then sought to have Cox fired. The President's obvious purpose was to avoid having to comply with a court order. His ultimate goal, as we know today and as many then suspected, was to obstruct justice.

If Bork knew or should have known about the President's ultimate goal, he could not, as the President's lawyer, ethically have helped him fire Cox. It would not matter that under other circumstances the President would have had this authority. The question is why the President ordered Cox fired when he did and what Bork knew or should have known about the President's reasons. At a time when millions of people in the nation had deep suspicions about the President's motives -- as the reaction to the discharge immediately revealed -- what did Bork think? What did he do to assure himself that the President's goals were lawful?

Bork has cited, as proof that he was not trying to help the President obstruct the Special Prosecutor's investigation, the fact that he immediately ordered the investigation to continue. He testified to the Senate committee considering his nomination to this present seat that on the day after the Cox discharge he told his subordinates that he "wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their

right to go to court to get the White House tapes or any evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox."[**] Bork also emphasized that he later named a new Special Prosecutor, Leon Jaworski, and made the same representations to him.

In fact, the record belies Bork's testimony. The day after Cox was fired, Bork abolished the Special Prosecutor's office and did not reestablish it and appoint Jaworski until November 2, a week after President Nixon, reacting to public pressure, agreed to accept a new Special Prosecutor. Furthermore, Bork's subordinates at the time have denied that the day after he fired Cox he guaranteed them independence and promised to guard their right to go to court to get the tapes. In fact, it defies belief to suggest that Bork authorized pursuit of the White House tapes the day after he fired Cox because Bork justified the decision to fire Cox by citing the authority of the President to direct Cox to desist from attempting to obtain the tapes.[**]

The Watergate episode, then, reveals two reasons to be cautious about Bork's nomination. First, he appears to have misdescribed to the Senate his actual role in the Cox affair. Second, he has not yet explained what it is he reasonably believes was President Nixon's purpose in ordering him to fire

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[**]Confirmation of Federal Judges, supra note 8, at 9.

[**]Anthony Lewis, "Bork and Watergate", New York Times, Aug. 23, 1987, sec. 4, page 23; Nina Totenberg, "All Things Considered", (NPR broadcast, Aug. 26, 1987).

Cox. Unless we know what he believed that purpose to be, we cannot know if, as the President's lawyer, Bork acted ethically and legally in carrying out his client's order.

CONCLUSION

The issue for the Senate is not whether the President of the United States may nominate a conservative to the Supreme Court. It is not whether Robert Bork would vote the correct way on any currently debated constitutional issue. And it is not whether Bork is "brilliant", or "independent", or "outspoken". Robert Bork should not be confirmed for the Supreme Court for wholly unrelated reasons.

Bork's views about the constitutional freedoms of Americans - what they are and what they should be - are extreme, inflexible, doctrinaire, and unacceptable. The radical constitutional theories he has espoused in great and forceful detail are harmless, so long as he does not have the power to impose them. On the Court he would. Bork's theories overwhelm common sense and our common heritage. In his rush to identify the forest of constitutional theory, Bork has repeatedly missed the trees of liberty.

No effort by Bork to distance himself from his views should be tolerated. As this essay shows, Bork is quite facile at tailoring his views to his audience. We think it plain that Bork has twice done just that with the very Committee that will examine him.

Bork's so-called neutral approach to judging makes him a poor choice to serve as a final guardian for Americans who depend on the federal courts, and ultimately the Supreme Court, for the promises and protections of the Bill of Rights. Bork's neutrality is a mask for abdication of the responsibility to judge.

Blacks, women, dissenters, and political and social minorities -a core constituency of our Bill of Rights - are especially vulnerable under Justice Bork.

Independent of Bork's views, his chameleon-like repackaging of his constitutional theories to appease the listener of the moment raises grave doubts about his candor. However witty and disarming these presentations may be, they are startling in their frequency and in the apparent lack of speaker embarrassment. Not only do Bork's views change, but so has his explanation of how he came to reach them. His insistence that the Indiana Law Journal article was merely an "academic exercise" by someone "entering a field for the first time" is directly contradicted by the fact that the article had a seven year gestation period and contained what he later described, (though now to an archly conservative audience) as his "finally worked out...philosophy."

Bork's character is further called into question by his behavior during the Watergate period. That behavior leaves too many unanswered questions. His apparent misdescription of his conduct in the same period raises other troubling questions.

We believe these reasons, cumulatively, provide more than ample justification for a conscientious Senator, attentive to his or her advise and consent responsibility, to vote no on the nomination of Judge Robert Bork to the Supreme Court.

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FREEDOM OF SPEECH

Introduction

In 1971, writing as a professor, Bork presented a theory of the First Amendment which suggests that it guarantees protection of political speech only, and even then, only speech that is not radical in its conclusions. In this view, speech advocating revolution or the violation of any law could be legally suppressed, and speech calling for civil disobedience would not be protected. Furthermore, literary, scientific, artistic, and non-political intellectual speech could be restricted or censored by the government without violating the First Amendment. In 1984, responding to criticism of his interpretation of the First Amendment, Judge Bork stated that he now recognized that the freedom of speech must cover moral and scientific debate as well as explicitly political expression.

However, questions remain over the extent to which Judge Bork has abandoned the First Amendment theory he advocated earlier in his career. It is unclear whether he would tolerate forms of dissent which advocate overthrow of the government or violation of the law, and whether he would allow government suppression of speech that is not explicitly political. It is clear from his judicial opinions that he will allow the government to restrict certain types of peaceful political protest, a position that particularly disadvantages those without access to the print or electronic media. In decisions concerning the F.C.C. fairness doctrine he has shown a disregard for the

public's right to have open and vigorous debate on public issues. In limiting libel suits, Judge Bork has protected the right of the press to voice opinions about political figures. However, while he has written a libel opinion that might seem favorable to the press, he has generally ruled against plaintiffs seeking to assert their right to freedom of speech and has taken positions that would limit public debate, even on political issues.

I. First Amendment Theory

Applying his general theory of constitutional interpretation, Judge Bork concluded, in his most comprehensive discussion of free speech rights, that because the text and history of the First Amendment give little guidance as to its proper interpretation, the only legitimate theory for protection of speech must be derived from the governmental structure established by the Constitution.[1] Bork clearly stated what he believed to be the implications of his theory:

> Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.[2]

In 1984, Judge Bork indicated that he has not abandoned his

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[1] Bork, "Neutral Principles and Some First Amendment Problems", 47 Ind. L.J. [illegible]

[2] Id. at 20.

theory but has modified its implications somewhat. He wrote: "I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection....I continue to think that obscenity and pornography do not fit this rationale for protection."[3] However, this is hardly reassuring for those concerned about the protection of First Amendment values.

Judge Bork has not publicly retracted his position that neither literary expression nor speech that advocates overthrow of the government or violation of a law are protected by the First Amendment. He would apparently sweep aside fifty years of doctrinal development, culminating in Brandenburg v. Ohio,[4] which held that the government may forbid the advocacy of force and lawlessness only where its direct purpose and likely result is imminent lawless action. If judges were to follow Bork's 1971 analysis and protect only speech that they consider explicitly political, First Amendment freedoms would be seriously compromised. Judge Bork has not been presented with a case involving seditious libel or the advocacy of civil disobedience. Thus, as a judge, he has not had occasion to define the limits of his theory. Even within the category of explicitly political speech, however, Bork's opinions have favored government regulation.

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[3] "Judge Bork Replies", 70 Am. Bar Assoc. J. 132 (1984). See also, R. Bork, Tradition and Morality in Constitutional Law 3-4 (1984) (arguing that state should be allowed to prohibit public display of an obscene word; criticizing Cohen v. California, 403 U.S. 15 (1971)).

[4] 395 U.S. 444 (1969).

II. Government Restriction of Political Protest

Five cases involving political protest in Washington, D.C. have come before Judge Bork. The most important of these, Finzer v. Barry,[5] demonstrates that Judge Bork does indeed wish to ignore "the dramatic developments in our first amendment jurisprudence during these five decades".[6] At issue was a statute barring demonstrations critical of a foreign government within 500 feet of an embassy. Father Finzer and the Young Conservative Alliance wished to carry signs critical of the Soviet Union and Nicaragua in front of those government's respective embassies. The D.C. Court of Appeals had upheld the same statute as constitutional in 1938 when citizens wished to criticize the German government.[7]

Judge Bork upheld the statute on the grounds that a content-based restriction on political speech critical of foreign governments is necessary to honor the law of nations. The judiciary, he argued, should defer to the political branches as it is a matter of foreign policy. One serious problem with this position is that it violates Supreme Court precedent with regard to viewpoint-based discrimination. Bork reasoned that because the statute applies equally to all embassies, there is no restriction on the basis of political viewpoint. However, only demonstrations critical of foreign governments are prohibited;

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[5] 798 F.2d 1450 (D.C. Cir., 1986) cert. granted 107 S. Ct. 1282 (1987).

[6] Id. at 1500 (Wald, J., dissenting).

[7] Frend v. United States, 100 F.2d 691 (D.C. Cir., 1938) cert. denied 306 U.S. 640 (1939).

supportive demonstrations are allowed. A statute which requires a person to get a permit when he wants to display a sign which protests the policies of a foreign government but does not require him to get a permit when he wants to support that government's policies is, on its face, a statute which discriminates on the basis of viewpoint and appears to strike at the indisputable core of the First Amendment. It puts greater obstacles in the way of people who want to express one viewpoint on a political issue in a public forum than it does on people who want to express an opposing viewpoint. The Supreme Court has recently reaffirmed that government regulations that attempt to suppress a particular point of view violate the First Amendment.* Even if the government were to ban all demonstrations, whether supportive or critical, the question remains whether the government interests in security, or in honoring treaty obligations, are genuine and sufficiently great to justify curtailment of the right to express political dissent. As Judge Wald points out in her dissenting opinion in Finzer, resolution of this issue has "nothing to do with judicial deference to assessments of the other branches on matters of foreign affairs."* It is the responsibility of the judiciary to balance the requirements of the First Amendment with international law concerning appropriate safeguarding of foreign embassies. Judge Bork's argument of deference to the executive

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*See Cornelius v. NAACP Legal Defense and Education Fund, 105 S. Ct. 3439 (1985).

*Finzer, 789 F.2d at 1478 (emphasis in original).

in this case is an insidious attempt to abdicate judicial responsibility and circumvent First Amendment precedent. The Supreme Court, having accepted the case for review next term, has a chance to rectify these errors.

In another case involving strategically located demonstrations, Judge Bork joined a dissenting opinion by Judge Scalia which held that a regulation prohibiting camping in certain D.C. parks did not unconstitutionally burden the First Amendment rights of homeless people who wanted to sleep in the park as a symbolic expression of their plight.[10] Although the Supreme Court agreed with the dissenting judges that the regulation was constitutional, they did so on narrower grounds, without accepting Judge Scalia's analysis that symbolic speech deserves no First Amendment protection.

In White House Vigil for ERA v. Watt,[11] the plaintiffs challenged regulations that prohibited them from carrying parcels of leaflets to hand out while demonstrating in front of the White House. The majority, noting that "we must balance the concerns of defendants responsible for the safety of the President and the established right of citizens to petition for a redress of grievances at a site uniquely adapted to their needs,"[12] authorized

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[10] Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C. Cir. 1985) (Scalia, J. dissenting) rev'd 468 U.S. 288 (1986).

[11] 717 F.2d 568 (D.C. Cir. 1983), modified 746 F.2d 1518 (1984).

[12] Id. at 570.

the District Court to allow demonstrators to carry parcels of leaflets to hand out while demonstrating. Judge Bork, on the contrary, noted that he would implement the regulations at issue without modification, thus placing burdensome restrictions on the demonstrators' right to freely communicate political protest.[13]

Judge Bork also joined the opinion in Juluke v. Hodel,[14] upholding the very same parcels regulation. The plaintiffs in Juluke were homeless people wishing to protest the closing of their shelter. The "parcels" involved were folding chairs that they had brought with them to sit on just outside the White House gate.

Finally, Judge Bork wrote the majority opinion in Lebron v. Washington Metro. Area Transit Authority.[15] The case arose when the transit authority refused to rent display space to an artist wishing to display a poster critical of the Reagan administration on the ground that the poster was misleading. Although citing generous language that political speech must be protected, and ruling in favor of the artist, Bork's opinion suggested that the transit authority could avoid displaying the poster by henceforth carrying out a policy of refusing to accept political advertising in general. Lebron, 749 F.2d at 899. The opinion demonstrates an aversion to censorship of particular political viewpoints but not a commitment to protecting robust public debate.

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[13] Id. at 573.

[14] 811 F.2d 1553 (D.C. Cir. 1987).

[15] 749 F.2d 893 (D.C. Cir. 1984).

A willingness to restrict political protests and symbolic speech, as demonstrated by Judge Bork's decisions, cuts off the only avenues of peaceful protest for those without money or political influence. Furthermore, symbolic speech and strategically-located picketing make important contributions to public debate. As Judge Wald pointed out in Finzer:

> [L]imiting speech addressed to foreign embassies will inevitably affect the competition of ideas in the United States. Current anti-apartheid protests in front of the South African embassy are very much a part of the domestic political debate about appropriate United States responses to the South African regime.[16]

Judge Bork has proven that he has no qualms about limiting political protest whenever a superficially neutral purpose or interest is asserted by the government.

III. Other Political Speech Cases

In Abourezek v. Reagan,[17] Judge Bork wrote a dissenting opinion arguing that the State Department should have the right to exclude aliens from visiting the United States, despite the fact that Congress passed the McGovern Amendment which provides that visas may not be denied solely on the basis of an individuals membership in a particular organization. The plaintiffs were American citizens who had invited certain foreigners (two Cubans, a Nicaraguan, and an Italian) to deliver lectures and discuss political issues. They maintained that exclusion of these

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[16] Finzer, 798 F.2d at 1487 (emphasis in original).

[17] 785 F.2d 1043 (D.C. Cir.), cert. granted, 107 S.Ct. 666 (1986). This case is also discussed in the section on Foreign Affairs, infra, at 101-103.

foreigners violated Americans' First Amendment right to engage in political discourse. The majority held that by denying the visas, the executive was evading the plain congressional intent of the McGovern Amendment. They noted that Judge Bork's approach gave the State Department "precisely the power that the McGovern Amendment was intended to revoke."[18] Thus, Judge Bork was willing to defer to executive power and allow the State Department to limit public political debate, disregarding both statutory and constitutional rights.

Political expression was also at issue in Block v. Meese,[19] where Judge Bork joined an opinion by Judge Scalia holding that government reporting requirements compelling the disclosure of each t.v. station, theater, or private organization showing certain films that the government has labelled as political propaganda, do not violate First Amendment rights to disseminate or receive ideas in private. The court did not consider whether the reporting requirements had the effect of limiting the distribution of such films by intimidating those who might otherwise show them.

IV. F.C.C. Regulation of Electronic Media

The policies of the Federal Communications Commission have

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[18] Id. at 1058 n.20.

[19] 793 F.2d 1202 (D.C. Cir. 1986). A case involving a different challenge to the same regulations was reviewed by the Supreme Court. See Meese v. Keene, 107 S. Ct. 1862 (1987) (government's use of term "political propaganda" does not impede access to speech protected by the First Amendment), reversing 619 F. Supp. 1111 (E.D. CA. 1985).

important implications for First Amendment values to the extent that they expand or contract opportunities for the expression of diverse views. In this area, the Supreme Court has identified the collective right of the public to have access to a wide range of views as the central First Amendment value, rather than any particular individual's right to express his or her view.[20] The fairness doctrine, requiring radio and television broadcasters to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[21] was, until its recent repeal by the F.C.C., one of the Commission's means of fulfilling the public's need to be informed. Additional regulations have had the same goal. Judge Bork's decisions in this area, which exhibit a consistent deference to FCC discretion, has allowed the administration to carry out a sweeping deregulation campaign without due consideration of its impact on First Amendment interests.

In Telecommunications Research and Action Ctr. v. F.C.C.,[22] Judge Bork held that because Congress had never expressly codified the fairness doctrine, the Commission was free not to apply it to teletext services, even though, for First Amendment purposes, that medium is indistinguishable from television and

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[20] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[21] 47 C.F.R. 73.1910 (1985).

[22] 801 F.2d 501, reh'g denied, 806 F.2d 1115 (D.C. Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3669 (U.S. Mar. 31, 1987) (No. 86-1371).

radio. Judge Bork's decision argued that because Congress approved the fairness doctrine in the form of a disclaimer, (stating essentially that nothing in this law revokes the fairness doctrine), rather than an affirmative command, the FCC was free to repeal it. Judges dissenting from the denial of rehearing called this interpretation "flatly wrong", and contrary to legislative history, Supreme Court interpretations, and prior D.C. Circuit decisions.[23] Judge Bork's opinion in this case apparently gave the F.C.C. the green light to go ahead and repeal the doctrine.

In two other cases, Judge Bork has written opinions upholding the F.C.C.'s deregulation of radio broadcasting, eliminating requirements designed to ensure that stations meet their statutory public interest obligations.[24] Judge Bork's decisions on the fairness doctrine and on F.C.C. regulation disregard the importance of the public's access to a wide variety of viewpoints. Although his general theory of the First Amendment suggests that public discourse on political issues should not be inhibited, in practice he has ruled in ways that restrict, rather than expand, public debate.

V. Libel

In contrast to his views which allow the government to quash political protest by disadvantaged or less powerful groups, Judge

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[23] Telecommunications, 806 F.2d at 1116.

[24] See Black Citizens for a Fair Media v. F.C.C., 719 F.2d 407 (D.C. Cir. 1983); Office of Communication of United Church of Christ v. F.C.C., 707 F.2d 1413 (D.C.Cir. 1983).

Bork has upheld the right of the press to engage in criticism of political figures, largely unfettered by private citizens' libel suits. In a concurring opinion in Ollman v. Evans,[25] he proposed a theory which would give the press unprecedented protection with regard to what it says about public figures who voluntarily enter public political debate. To justify this move, Bork had to abandon judicial restraint and argue that although the framers apparently did not envision libel actions as a major threat to freedom of the press, changed conditions require the adaptation of judicial doctrines.[26] Moreover, he admitted that his theory would violate his general judicial philosophy by "admitting into the law an element of judicial subjectivity."[27]

In an earlier libel case, although allowing the plaintiff to proceed, Judge Bork warned that libel suits can threaten the independence of the press and lead to self-censorship.[28] He also wrote opinions for the court in two other libel suits properly dismissed on jurisdictional grounds.[29]

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[25] 750 F.2d 970, 993 (D.C. Cir. 1984).

[26] Id. at 995-96.

[27] Id. at 997.

[28] McBride v. Merrell Dow, 717 F.2d 1460, 1466 (D.C. Cir. 1983) (published statement that expert witness received $5000 per day for testifying in court may have defamatory meaning, hence it was inappropriate to dismiss for failure to state a claim).

[29] See Moncrief v. Lexington, 807 F.2d 217 (D.C. Cir. 1986) (nonresident newspaper publisher sending allegedly libelous article into District of Columbia is not thereby subject to District's long-arm statute and federal court in D.C. does not have personal jurisdiction over publisher); McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986) (fourth lawsuit arising

Judge Bork's opinions in libel cases have argued in favor of substantial protection for the press, but only in a limited range of circumstances; namely when the press criticizes an individual who has entered a political arena. Despite the rhetoric of Judge Bork's opinion in Ollman, and his own commentary on that opinion in which he claimed that "in an opinion like Ollman...I think I am defending the central meaning of the First Amendment...."[30] in reality his position, at its most generous, is simply that "we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others need not."[31] Such a proposition may protect the press, but it hardly qualifies Judge Bork to claim that he is a champion of the First Amendment.

Conclusion

Judge Bork has considered government restrictions on political expression on seven different occasions. Only once did he rule that the First Amendment's protection of the freedom of speech requires overturning the regulation. He has repeatedly upheld laws preventing peaceful methods of protest on rather minimal grounds of governmental convenience. He has also argued for deference to the executive's attempts to limited United

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from same events and raising same claims is barred by collateral estoppel; issues have already been litigated).

[30] "An Interview With Judge Robert H. Bork", Judicial Notice, (reprint June 1987) at 11.

[31] Ollman, 750 F.2d at 1002.

States citizens' access to the political ideas of certain foreigners, and shown a willingness to allow foreign policy concerns to limit peaceful protests in front of embassies in the United States. These decisions demonstrate that even within what Judge Bork considers the core of the First Amendment, he has been reluctant to restrain government action that inhibits speech. Judge Bork's interpretation of the First Amendment also raises serious questions about the extent to which he would protect non-political speech.

EMPLOYMENT DISCRIMINATION, EQUAL PROTECTION AND AFFIRMATIVE ACTION

Introduction

At a time when black and white opponents of segregation and racial discrimination were literally risking their lives to extend the constitutional guarantee of equal protection of the laws to all citizens regardless of race, Judge Bork was concerned about the rights and freedoms of those who wished to maintain segregation. He was opposed to the 1964 Civil Rights Act in part because it limited the freedom of businesses to discriminate. What is most significant about Judge Bork's views on employment discrimination, equal protection, and affirmative action is that today he continues to maintain an extreme position on issues of equality, drastically limiting the scope and meaning of statutory and constitutional guarantees. He has indicated that the equal protection clause should apply to blacks only, and not to women. His application of the Clause to other ethnic minorities is unclear. Bork questions the very basic assumption that all racial groups are essentially equal, arguing that legal policies regarding equality should take into account the fact that cultural diversity leads to different ethnic groups having different talents. His major opinion interpreting Title VII of the Civil Rights Act, a dissent in Vinson v. Taylor,[1] was overruled by the Supreme Court on three main issues in an opinion written by Justice Rehnquist. Bork's dissent in Vinson is the

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[1] 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

only opinion in which he has discussed at any length, the merits of an employment discrimination or equal protection claim. Thus, to evaluate his position in this area it is necessary to draw on academic writings, speeches, and other public records indicating Bork's views.

I. Judge Bork's Early Views

In 1963 Bork opposed the Civil Rights Act on the grounds that private individuals and businesses should have the freedom to discriminate against certain racial groups. In an article in New Republic he wrote that the legislation:

> means a loss in a vital area of personal liberty... The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate.[2]

Moreover, he argued that the principle behind the Civil Rights Act is too expansive:

> If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate.... Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed?....It is difficult to see an end to the principle of enforcing fair treatment by private individuals.[3]

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[2] Bork, "Civil Rights - A Challenge", New Republic, Aug. 31, 1963 at 22.

[3] Id.

Likewise, in 1964 Bork argued that because the Civil Rights Act is so expansive, it is unenforceable. He wrote:

> The fair employment section even outlaws discrimination by reason of sex....This attempt to enforce fair treatment for almost every conceivably disadvantaged group would completely overload the enforcement machinery.[*]

These views demonstrate at the very least, an extreme insensitivity to the situation of women and ethnic minorities. Bork did not feel compelled to publicly retract these arguments until, facing confirmation as Solicitor General in 1972, a Senator questioned his ability to enforce the Civil Rights Act.[=] Bork's complete retraction was as follows:

> I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. The reason I do no agree with that article, it seems to me I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today I would support it.[*]

This statement must be measured against Bork's more recent public statements, and his judicial opinions.

Anticipating his later opposition to affirmative action, in 1968 Bork argued that Black people need to create their own businesses. Rather than encourage integration, Bork stated that:

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[*]Bork, "Against the Bill", The Chicago Tribune, Mar. 1, 1964 at pg. 1 col. 1 and pg. 8, col. 1.

[=]See Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General, Hearings before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 14-15 (1973).

[*]Id. at 14.

> Only with the development and expansion of black capitalism will Negroes be brought into the main economic stream.... Nothing is to be gained and much may be lost if public figures continue, for instance, to lay all of the Negroes' problems at the door of 'white racism'.[7]

It is interesting that Bork apparently now opposes the use of quotas and goals in federal programs which were designed to aid the minority business enterprises that have been established.

II. Judge Bork's Present Views

More recently, Judge Bork has stated that he opposes the use of racial or ethnic preferences in creating a remedy for past discrimination. His reasoning is not simply that the use of racial preferences is always harmful. Bork disagrees with the fundamental proposition that equal opportunity and the elimination of racial discrimination against ethnic minorities will lead to a more integrated society. Commenting on the Supreme Court's Bakke decision, Bork stated that affirmative action:

> may be reckless in the chances it takes with the future of this society. The policy of affirmative action ... assumes that, if there is no societal discrimination, every race and ethnic group would achieve proportional representation in every field. There is no reason to suppose any such thing to be true. The world does not work that way. Group cultures differ and that leads to differing interests and differing talents.[8]

This view has significant implications, in as much as one assumption in employment discrimination law is that all races and ethnic groups have roughly the same distribution of qualities and

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[7] Bork, "Why I am for Nixon", New Republic, June 1, 1968 at 19, 21.

[8] Bork, "A Murky Future", Regulation, Sept./Oct. 1978 at 38.

potentialities. Particularly in entry-level jobs, the virtual absence of minority employees from a particular type of employment is assumed to demonstrate a discriminatory motive on the part of the employer.[9] Indeed, the Supreme Court has stated:

> [I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though §703(j) [of Title VII] makes clear that Title VII imposes no requirement that a work force mirror the general population.[10]

By emphasizing that different group cultures lead to "differing interests and differing talents," Bork is apparently sympathetic to arguments that ethnic minorities or women are underrepresented in certain occupations because culturally they are, for example, less intellectual or not as ambitious as whites or males. Does this view require that employment discrimination plaintiffs prove that their race or ethnic group is equally talented before they are permitted to use statistics of underrepresentation in the workforce as evidence of discrimination? Bork's understanding of cultural diversity appears to blame the victims of discrimination before they have a chance to demonstrate how individual or institutional discrimination has worked against them.

III. Sexual Harassment as Sex Discrimination

In an opinion dissenting from the D.C. Circuit's decision

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[9] International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

[10] Id. at 340 n.20.

not to rehear Vinson v. Taylor,[11] Judge Bork made three arguments which were flatly denied by the Supreme Court. Bork suggested that Title VII of the Civil Rights Act, which outlaws employment discrimination, was never meant to cover sexual harassment.[12] On appeal to the Supreme Court, Justice Rehnquist wrote the opinion for the Court, stating: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[13]

Secondly, Judge Bork argued that a plaintiff's voluntariness in participating in sexual activity is a defense to a charge of sexual harassment. He wrote:

> According to the panel opinion, when an employee charges sexual harassment in the workplace, the supervisor charged may not prove that the sexual behavior, far from constituting harassment, was voluntarily engaged in by the other person, nor may the supervisor show that the charging person's conduct was in fact a solicitation of sexual advances. These rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it.
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> In this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank. While hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged

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[11] 760 F.2d 1330 (1985) (denial of rehearing en banc), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

[12] Vinson, 760 F.2d at 1333 n.7.

[13] Vinson, 106 S. Ct. at 2404.

in.[14]

The Supreme Court held that while evidence of the plaintiff's allegedly provocative speech or dress is admissable, the correct inquiry is whether the sexual advances were unwelcome, not whether the plaintiff's conduct was voluntary.[15] The plaintiff only needs to prove that she indicated that the sexual advances were unwelcome because a sexual harassment claim is based on the assertion that the employer has created a hostile working environment for members of one sex.

Finally, Judge Bork stated that an employer should not be held liable for a supervisor's acts of sexual harassment because such a rule "is at odds with traditional practice which was not to hold employers liable at all for their employee's intentional torts involving sexual escapades."[16] In concurrence, Justices Marshall, Brennan, Stevens and Blackmun disagreed with the majority over the exact circumstances under which an employer would be responsible for acts of sexual harassment, but both the majority and concurring opinions in the case made it clear that an employer is not normally nor automatically absolved of all responsibility for such acts.[17] Thus, Judge Bork was more restrictive than Justice Rehnquist on the questions of whether sexual harassment is discrimination, what is required to prove

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[14] Vinson, 760 F.2d at 1330-31.

[15] Vinson, 106 S. Ct. at 2406.

[16] Vinson, 760 F.2d at 1332.

[17] Vinson, 106 S. Ct. at 2408.

sexual harassment, and what remedies are available to a plaintiff who prevails on the merits of the case. In addition, the tone of Judge Bork's opinion tended to denigrate the seriousness of sexual harassment claims generally, trivializing the behavior involved as "sexual dalliance" and "sexual escapades."[18]

IV. Employment Discrimination Generally

Judge Bork has written two majority opinions in cases involving employment discrimination claims. However, neither opinion discusses the merits of the case because the holdings were based on lack of standing[19] and sovereign immunity.[20] In addition, he joined three unanimous panel opinions reviewing Title VII sex discrimination claims. In Oates v. District of Columbia,[21] the panel ruled that the District of Columbia had a legitimate, non-discriminatory reason for revoking the appointment of a woman as head football coach at a local high school. Palmer v. Schultz[22] was remanded because the district court failed to properly apply established Title VII standards. In Laffey v. Northwest Airlines, Inc.,[23] the court stood by its two previous opinions on appeals in the same case, and applied clear Supreme

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[18] 760 F.2d at 1330, 1333.

[19] Von Aulock v. Smith, 720 F.2d 176 (D.C. Cir. 1983).

[20] Morris v. Washington Metro Area Transit Authority, 781 F.2d 218 (D.C. Cir. 1986).

[21] Slip opinion No. 86-7033, July 28, 1987.

[22] 43 Fair Emp. Prac. Cas. (BNA) 452 (1987).

[23] 740 F.2d 1071 (D.C. Cir. 1984) (per curiam), cert. denied, 469 U.S. 1181 (1985).

Court precedent to resolve this litigation which had carried on for fourteen years. Finally, Judge Bork was on a panel which, again applying settled law, held that the Foreign Service is covered by the Equal Pay Act.[24]

V. Equal Protection

The Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[25] The interpretation of this clause determines the extent to which the Constitution guarantees the equality of all citizens and groups in society. Judge Bork wrote in 1971 that "most of substantive equal protection is...improper."[26] At that time he criticized the Supreme Court's equal protection decisions, including even Shelley v. Kraemer,[27] which held that judicial enforcement of racially restrictive covenants in real property deeds violates the Fourteenth Amendment. What this means is that Judge Bork would allow the courts to enforce "whites only" or "no Jews or Catholics" agreements among landowners.

Although approving of the Brown v. Board of Education[28] decision in principle,[29] Bork has opposed judicial attempts to

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[24] Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983).

[25] U.S. Const. amend XIV.

[26] Bork, "Neutral Principles and Some First Amendment Implications", 47 Ind. L. J. 1, 11 (1971).

[27] 334 U.S. 1 (1948).

[28] 347 U.S. 483 (1954).

[29] See Neutral Principles, supra, at 13-15.

enforce it. In 1972 he argued that Congress could prohibit federal courts from issuing bussing orders.[30] As Solicitor General he was anxious to have the Supreme Court consider his views on the need to limit busing and even went so far as to draft a brief, on his own initiative, asking the Court to hear an appeal in the Boston School district litigation.[31] In 1982, in private practice, Bork represented an all-white school district in Pennsylvania which had been resisting court-ordered desegregation for over ten years.[32] In that case, Bork advocated that plaintiffs must identify, by direct proof, specific acts of intentional or purposeful racial discrimination which directly caused segregated school districts. The Third Circuit rejected that argument as clearly contrary to Supreme Court precedent.[33]

Judge Bork has written opinions in two cases involving equal protection claims. Both times he argued that the government's classification was rationally related to a legally permissible end. In Dronenburg v. Zech[34], he argued that the Navy's discharge of homosexuals is rationally related to a permissible government

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[30] See Equal Educational Opportunities Act, Hearings Before the House Comm. on Edu. and Labor, part 3, 92d Cong., 2d Sess., July 31, 1972 at 1507.

[31] See G. Orfield, Must We Bus 352 (1978).

[32] See Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (3rd Cir. 1982).

[33] Id. at 1114-16.

[34] 741 F.2d 1388, 1389 (1984). This case is more fully discussed in the Privacy Rights section, infra at 33-35.

purpose. In Cosgrove v. Smith[35], Bork wrote a dissenting opinion expressing the view that different parole guidelines for D.C. Code offenders who are randomly assigned to federal prisons as opposed to those who are in D.C. prisons, do not violate the equal protection clause.

While Judge Bork's views on equal protection law have not been fully discussed in his court opinions, he has had occasion to explain his position in greater depth in academic writings. In 1971 Bork wrote that:

> The equal protection clause has two legitimate meanings. It can require formal procedural equality, and because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible.[36]

He went on to criticize several of the Court's equal protection decisions, including Skinner v. Oklahoma,[37] which held that a state law requiring sterilization of habitual robbers but not embezzlers violates the equal protection clause; Shapiro v. Thompson,[38] holding that state residency requirements for welfare benefits denies equal protection; and Levy v. Louisiana,[39] which concluded that a state may not allow legitimate children to bring

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[35] 697 F.2d 1125 (1983) (Bork, J. dissenting).

[36] Bork, "Neutral Principles", supra note 27, at 11.

[37] 316 U.S. 535 (1942).

[38] 394 U.S. 618 (1969).

[39] 391 U.S. 68 (1968).

wrongful death actions while denying that right to illegitimate children. He argued that these decisions appeared to be based merely on the Justice's "personal beliefs about what interests or gratifications ought to be protected."[40]

Judge Bork has not explicitly commented further on his views of equal protection law since the 1971 Indiana Law Journal article. He has, however, indicated a general disapproval of extending the equal protection clause beyond its original direct purpose of enfranchising black people. In a 1982 speech he stated:

> When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them....All of these are nationalizations of morality, not justified by anything in the Constitution....[41]

More recently, in a 1985 interview he commented that:

> [F]or every piece of legislation there is a minority who lost, whether one defines that as criminals or some other group. And unless the Constitution - which after all is a limit upon legislatures and not a mandate of power for judges to do as they see fit - says this minority is protected in these ways, then I think the judge must remit this minority to the democratic process...I don't think being remitted to the democratic process is a sad fate for most people.[42]

Thus, it appears that Judge Bork has not departed significantly

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[40] Bork, "Neutral Principles", supra note 27, at 12.

[41] Bork, "Federalism and Gentrification", Address by Judge Bork to The Federalist Society, Yale University Law School, New Haven, Ct. April 24, 1982.

[42] "Justice Robert H. Bork: Judicial Restraint Personified", California Lawyer, May 1985 at page 26.

from his 1971 analysis of equal protection law. In addition, it is likely that Judge Bork would agree with Chief Justice Rehnquist that affirmative action programs and race-conscious remedies for past discrimination are themselves barred by the Fourteenth Amendment.[43]

However, the Supreme Court has gone beyond the very limited interpretation of the equal protection clause suggested by Bork's earlier views. In reviewing legislation that creates classifications and discriminates among them, the Supreme Court has determined that equal protection imposes the requirement of rationality; a classification must be reasonably related to the purpose of the legislation. Furthermore, certain classifications, based on race, or ethnicity, are considered inherently suspect and require strict scrutiny. In addition, a majority of the Court has held that gender-based classifications are quasi-suspect and legislation that uses them must receive an intermediate level of scrutiny.

Judge Bork's theory of strict interpretivism, as applied to the Fourteenth Amendment, suggests that equal protection does not apply to gender-based discrimination. He has stated that he opposes the proposed Equal Rights Amendment because Congress, not the courts, should determine the meaning of sexual equality.[44] In his analysis, the ERA's blanket proscription of sexual equality gives judges the responsibility of interpreting what

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[43] See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart & Rehnquist, JJ., dissenting).

[44] See "An Interview with Robert H. Bork", Judicial Notice, (reprint June 1987) at 7-8.

sexual equality means on a case by case basis. Characterizing equality as a political good to be secured through the legislative process rather than an inherent right to be protected by the courts, Judge Bork stated:

> [T]he [Equal Rights] Amendment didn't say that Congress shall have power to provide for sexual equality in all cases, or something of that sort. What it said was, "Judges shall have power to decide what sexual equality is in all cases." Now the role that men and women should play in society is a highly complex business, and it changes as our culture changes....[the ERA] was a shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out.[48]

It seems ironic that Judge Bork would oppose on separation of powers grounds a measure that, if adopted, would have been endorsed by the U.S. Congress as well as a two-thirds majority of the state legislatures. Nevertheless, the most compelling question raised by this survey of Judge Bork's views on equal protection law is whether he would accept and apply the Supreme Court's present analysis of the equal protection clause. Would he apply it to ethnic minorities other than blacks? Does he agree that gender-based discrimination must be subjected to a higher level of scrutiny?

VI. Handicapped Discrimination

Judge Bork has written one opinion and joined one opinion relating to the needs of the handicapped. In both, the result of his holding would deny handicapped people access to certain

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[48] Id.

facilities. In California Association of the Physically Handicapped v. F.C.C.,[46] Judge Bork wrote the majority opinion, from which Judge Wald dissented, holding that the F.C.C. was not responsible for the failure of its licensing procedure to make television stations take steps to hire the handicapped and increase programming understandable to the hearing impaired.

In Paralyzed Veterans v. Civil Aeronautics Board,[47] the majority held that all airlines, because they make use of airports that accept federal funds, are subject to Section 504 of the Rehabilitation Act, which requires that facilities be accessible to handicapped individuals. Judge Bork dissented, arguing that only those airlines which received direct federal funding should be subject to Section 504. His opinion indicated that he believes that this type of constraint on the effectiveness of federal anti-discrimination legislation, including Title VII of the Civil Rights Act should be extended. The Supreme Court, with Justices Marshall, Brennan, and Blackmun dissenting, reversed the decision, agreeing with Judge Bork's dissent.

Conclusion

Judge Bork's writings indicate that he would severely curtail the equal protection clause as a means of ensuring basic equality and freedom from unjustified governmental discrimination.

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[46] 778 F.2d 823 (1986).

[47] 752 F.2d 694 (D.C. Cir. 1984), rev'd sub nom. Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986).

He has never directly stated that ethnic minorities and women deserve to be treated differently because they are not equal to whites or to men. However, he refuses to recognize that equality before the law is a basic human right, preferring that such equality be won in the political marketplace.

PRIVACY RIGHTS

Introduction

The right to privacy is, for Judge Bork, the archetypal new right that has been created illegitimately by an activist judiciary. Denying that the Constitution and Bill of Rights guarantee a general right to privacy, Judge Bork has argued that personal decisions such as whether to have an abortion, use contraceptives, live with one's grandchildren, or send one's children to private schools are all subject to government control. Previous Supreme Court cases, going back to 1922, have held that the freedom to make these personal decisions without government intervention is inherent to the concept of liberty and protected by the Constitution. The mainstream academic debate has been over the proper foundation and extent of the right to privacy, some characterizing it as based on personal autonomy, others claiming that it is based on a collection of various individual freedoms. Few have gone so far as to deny that such a constitutional right exists.[1]

Judge Bork's position that there is no right to privacy is contrary to a substantial body of Supreme Court precedents and outside the mainstream academic debate. He criticized the Supreme Court's privacy analysis as early as 1971 in his Indiana Law Journal article, "Neutral Principles and Some First Amendment

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[1] See, e.g., L. Tribe, American Constitutional Law, 886-889 (1978).

Problems".[2] As a judge, his opinion for the court in Dronenburg v. Zech[3] held that private, consensual homosexual conduct is not protected by the right to privacy, and that government discrimination against homosexuals does not violate due process and equal protection guarantees. He used that case as an opportunity to present his view that there is no general constitutional right to privacy. Judge Bork has also ruled to deny the protection of individual privacy in cases involving First and Fourth Amendment issues, even though he has said that those amendments entail some protection of privacy. Finally, he has denied redress to plaintiffs seeking to assert statutory privacy rights. Thus, in addition to denying a general constitutional right to privacy, it is likely that, in present controversies, Judge Bork would be unsympathetic to those who claim that employee drug testing or government intelligence files on innocent private citizens violate statutory or fourth amendment privacy rights.

Judge Bork has stated that the landmark decision in Roe v. Wade,[4] which held that the right to privacy protects a woman's decision to have an abortion in the first trimester of pregnancy, is fundamentally wrong and not an established precedent. By his standards of judicial review, he believes that the Court

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[2]Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971).

[3]741 F.2d 1388, reh. denied, 746 F.2d 1579 (D.C. Cir. 1984).

[4]410 U.S. 113 (1973).

is free to overrule that decision. His vote on this issue would be pivotal, as he would be replacing Justice Powell who has ruled to uphold the right to privacy in several key five to four decisions.

I. Dronenburg and Bork's Privacy Rights Analysis

Judge Bork views the general constitutional right of privacy as a newly created right that has no justification in the text, history, or structure of the Constitution, and goes "beyond the known intentions of the framers."[5] He concludes that the right to privacy "has no life of its own,"[6] although personal privacy may be constitutionally protected when necessary to further First Amendment freedoms,[7] or as part of the guarantee against unreasonable searches and seizures.[8] For Judge Bork, privacy may be constitutionally protected as a means to an end, but not as an end in itself because the Constitution does not specifically mention a right to privacy.

Thus, when linguist and cryptographer James Dronenburg, having been discharged from the Navy because he had engaged in consensual homosexual acts, argued that the discharge violated

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[5] Bork, "The Constitution, Original Intent and Economic Rights", 23 San Diego L. Rev. 823, 828 (1986) [hereinafter, Bork, "The Constitution"].

[6] Dronenburg, 741 F.2d at 1392.

[7] Dronenburg, 741 F.2d at 1392.

[8] Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J. concurring) ("The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy.")

his constitutional right to privacy, Judge Bork held that "we can find no constitutional right to engage in homosexual conduct and ... we have no warrant to create one."[9] In his view, the right of privacy that Dronenburg asserted was not connected to any other freedom guaranteed in the Constitution or Bill of Rights.[10] What is most extreme and dangerous about Bork's opinion in Dronenburg is the assault he makes on the right to privacy generally. Bork stated that he could not find any general principle underlying the Supreme Court's privacy decisions.[11] However, the Supreme Court has articulated the unifying principles involved in privacy cases. For example, in Whalen v. Roe,[12] Justice Stevens, writing for a unanimous court, stated that prior decisions interpreting the constitutional right of privacy have involved two kinds of interests: "the individual interest in avoiding disclosure of personal matters and....the interest in independence in making certain kinds of important decisions."[13] As a Justice, Mr. Bork has apparently committed himself to rejecting this position.

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[9] Dronenburg, 741 F.2d at 1397.

[10] Id. at 1392.

[11] See Dronenburg, 741 F.2d at 1396; and 746 F.2d at 1583 (statement of Judge Bork in response to dissent from court's denial of rehearing en banc).

[12] 429 U.S. 589 (1977)

[13] Id. at 599-600.

Moreover, legal scholars have traced the general constitutional right of privacy to the text, history and structure of the Constitution.[14] Thus, Bork is extreme in concluding that neither the Constitution nor Supreme Court precedent provides principles of the right to privacy that can be applied to new situations.

By denying that a right to privacy could ever be legitimately derived from the text, structure, or history of the Constitution, Judge Bork implies that any private sexual behavior, family conduct, or personal relationship is a permissible subject of state regulation.[15] In a recent case, Judge Bork joined a panel decision holding that the FBI's refusal to hire a lesbian does not violate the equal protection guarantee of the Fourteenth Amendment.[16] The court found that the government's discrimination against homosexuals and lesbians was rational because homosexual conduct is criminal in roughly half of the states and because homosexuals are more likely to be blackmailed. The plaintiff had argued in the

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[14] See, e.g., R. Hixson, Privacy in a Public Society 71-89 (1987); Note, "Griswold Revisited in Light of Uplinger: An Historical and Philosophical Exposition of Implied Autonomy Rights in the Constitution", 13 N.Y.U. Rev. of L. & Soc. Change 51 (1985).

[15] See also Franz v. United States, 712 F.2d 1428 (1983), where Bork argued that a non-custodial parent's interest in maintaining contact with his or her children is not protected by the Constitution, nor subject to constitutionally required procedural protections.

[16] Padula v. Webster, No. 86-5053 (D.C. Cir., June 26, 1987) (Silberman, J.).

trial court that her privacy and due process rights were also violated but dropped that argument on appeal.

In Planned Parenthood Federation of America v. Heckler,[17] Judge Bork wrote a separate opinion concurring in part and dissenting in part which argued that despite evidence of congressional intent that contraceptives should be made available to teens with confidentiality, the Secretary of Health and Human Services may have the power to require parental notification when a minor seeks to obtain contraceptives. The other judges on the panel did not share this view. While the case was decided on statutory grounds, Bork's argument implies that the constitutional right to privacy does not protect a teenager's decision to use contraceptives.

Despite the fact that Judge Bork appeared to acknowledge a right to privacy within the penumbra of the First Amendment,[18] he joined an opinion by Judge Scalia holding that government reporting requirements do not significantly impair the First Amendment right to disseminate and receive ideas in private.[19] The regulations required reporting of the name of each T.V. station, private organization, or theater using certain films

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[17] 712 F.2d. 650 (1983).

[18] See Dronenburg, 741 F.2d at 1392.

[19] Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986). A case involving a different challenge to the same regulations was reviewed by the Supreme Court. See Meese v. Keene, 107 S. Ct. 1862 (1987) (government's use of term "political propaganda" does not impede access to speech protected by the First Amendment), reversing 619 F. Supp. 1111 (E.D. CA. 1985).

(those at issue were about nuclear war and acid rain) the date of showing, and the estimated number of attendants.

Bork also joined a decision which disregarded the statutory privacy rights of an applicant for the foreign service who sought to have damaging allegations removed from her files.[20] Although the case involved interpretation of the Privacy Act of 1974,[21] the decision draws a balance between individual rights and governmental power with constitutional implications. Judge Wald, dissenting, wrote:

> By allowing agencies to retain in files maintained on individuals, accusations of alleged damaging admissions by the subjects of the files without any need to determine the accuracy of such accusations or their fairness to the individuals, the court writes out of the [Privacy] Act's protections a significant source of unevaluated yet potentially ruinous material, with critical consequences to the future of the individuals involved. The majority's rationale....could pave the way for the return of the old-style government dossier replete with unfiltered and unproved charges.[22]

Judge Bork appears skeptical of privacy rights whenever they are in conflict with the government's interests. He not only denies that there is a general constitutional right to privacy; he has also decided cases denying First Amendment and statutory privacy rights.

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[20] Doe v. U.S., No. 84-5613 (D.C. Cir., June 19, 1987) (Ginsburg, J.).

[21] 5 U.S.C. 552a (1982).

[22] Doe, dissent of Judge Wald at 1.

In his Dronenburg opinion, Bork criticized Supreme Court decisions holding that the right of privacy protects the use of contraceptives by married and unmarried couples, and protects the right of a woman to decide to have an abortion before the fetus is viable outside the womb.[23] The right to privacy has also been invoked to overturn a statute criminalizing the possession and reading of obscene materials in the home,[24] and to strike down zoning provisions that arbitrarily defined "family" to include only nuclear families, thereby preventing a woman from living with her grandchildren.[25] Parental decisions about child rearing and education, including the right to send a child to a private school, have also been protected from state interference on the grounds that a right of personal privacy is implied in the concept of liberty guaranteed by the Fourteenth Amendment.[26] Privacy rights are implicated in current controversies over drug testing, AIDS test results, private or government computerized records of personal information about private citizens, and government intelligence files. Thus, Bork's analysis has implications beyond the private sexual behavior at issue in Dronenburg.

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[23] Dronenburg, 741 F.2d at 1392-95.

[24] Stanley v. Georgia, 394 U.S. 557 (1969).

[25] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[26] See Pierce v. Society of Sisters 268 U.S. 510 (1924); Meyer v. Nebraska 262 U.S. 390 (1922).

II. The Principle of Stare Decisis and the Right to Privacy

Courts generally recognize the principle of stare decisis which requires them to stand by precedent and not to disturb settled points of law. Given stare decisis, will Judge Bork would attempt to overturn existing precedents that protect the right to privacy? He has sought to divorce his outspoken views from his likely performance on the court by suggesting that he merely disagrees with the principles or lack of them, used in reaching a particular result rather than with the result itself. He has made statements such as:

> I am not arguing that any of the privacy cases were wrongly decided - that is a different question.[27]

> Had our real purpose been to propose...that those [privacy] cases be eliminated from constitutional law, we would have engaged in a much more extensive analysis than we undertook.[28]

> The abortion cases are an example. I have no problem with the rules they laid down, except I don't think they should have been imposed by a court.[29]

These statements notwithstanding, as a Supreme Court Justice, his first allegiance must be to the Constitution itself and not prior court decisions. When asked in Senate confirmation hearings: "How strongly do you adhere to the principle of

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[27] Bork, "The Constitution", supra note 5, at 829.

[28] Dronenburg, 746 F.2d at 1582.

[29] Bleicher, "Faculty Profile - Robert Heron Bork", Yale L. Rep., Vol. 24, No. 3, Spring, 1978 at 10.

stare decisis?", Judge Bork responded the only way he could; stating:

> Well, I think as a court of appeals judge one has to adhere to it very strongly, and that is to follow the lead of the Supreme Court. It is less clear, for example, about precedent within a single court and whether that court should follow it or not. For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court. If that were not true, the commerce clause would still be as limited as it was in 1936.[30]

When pushed further he added:

> I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.[31]

The decisions protecting abortion and use of contraceptives apparently rise to the "wrong and perhaps pernicious" standard for Judge Bork.[32] In a forum as formal and serious as Senate hearings, he testified that he was convinced that Roe v. Wade is an unconstitutional decision.[33] Bound by the Constitution first and precedent second, Judge Bork must rule according to

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[30] Confirmation of Federal Judges: Hearings before the Committee on the Judiciary, 97th Cong., 2d Sess., 13-14 (1982) (exchange between Mr. Bork and Senator Baucus).

[31] Id. (emphasis added).

[32] See Greenhouse, No Grass is Growing Under Judge Bork's Feet, New York Times Aug. 4, 1987 p. A18 at Col. 1 (Bork does not consider Roe v. Wade to be a settle precedent).

[33] See The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 97th Cong., 1st Sess., 310 (1982).

his interpretation of the Constitution.[34] He cannot consistently maintain that the Supreme Court's privacy decisions are unprincipled and unconstitutional but that he would not rule to overturn or weaken them.

III. Bork vs. Powell on the Right to Privacy

The only remaining question is whether Judge Bork could be successful in overturning right to privacy precedents. To the extent that present Justices maintain the positions they have endorsed in past opinions, the answer is probably yes. In a series of cases since Roe v. Wade, the Supreme Court has struck down state legislation that restricts abortion rights. The most recent case decided with written opinions, Thornburgh v. American College of Obstetricians and Gynecologists,[35] is significant because of its five-four margin which included Justice Powell in the majority. In dissent, Justices White and Rehnquist attacked the premises of the Roe v. Wade decision.[36] Justice O'Connor indicated her disapproval of Roe v. Wade's trimester analysis in an earlier case.[37] Thus, Judge Bork would be joining a court in which three Justices

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[34] See also Barnes v. Kline 759 F.2nd 21, 56. (Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution).

[35] 106 S. Ct. 2169 (1986).

[36] Id. at 2192 (White, J. dissenting).

[37] See Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 455-59 (1983) (O'Connor, J., dissenting).

have directly indicated that the Roe v. Wade decision needs to be changed. This past term, Chief Justice Rehnquist and Justices White and Scalia dissented from the summary affirmance of a Ninth Circuit opinion striking down a state law interfering with abortion rights, suggesting they would have upheld the law.[35] Judge Bork would constitute the necessary fifth member to create a majority for the position that states may enact intrusive and chilling regulations which aim to coerce women's decisions about abortion.

Judge Bork's analysis of the constitutional right to privacy is very different from that of Justice Powell, whom he would be replacing. In appraising Justice Powell's position, it is useful to distinguish between the Fourth Amendment's prohibition of unreasonable searches, which protects privacy; and the more general right to privacy which seeks to ensure individual autonomy. With regard to the former, Justice Powell has sided with the more conservative Justices in preferring state police powers over individual privacy rights.[36] However, with regard to the latter, Justice Powell has been a crucial fifth vote to uphold a general right of privacy. Justice Powell wrote the opinion for the Court in Moore v. City of East

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[35] Babbitt v. Planned Parenthood, 107 S. Ct. 391 (1986) (Justice O'Connor took no part in the consideration or decision of the case).

[36] See, e.g., O'Connor v. Ortega, 107 S. Ct. 1492 (1987); Oliver v. United States, 466 U.S. 170 (1984).

Cleveland,[40] a five to four decision striking down the zoning ordinance that kept a woman from living with her grandchildren. In that decision he wrote: "A host of cases have consistently acknowledged a private realm of family life which the state cannot enter."[41] More recently he wrote the Court's opinion in Akron v. Akron Center for Reproductive Health,[42] where he stated that "the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade." Justice Powell also delivered the opinion of the court in Planned Parenthood Association v. Ashcroft,[43] which struck down a state law restricting abortions by requiring all abortions after the 12th week of pregnancy to be performed in a hospital. He concurred in the result in an important case protecting the right of unmarried persons to use contraceptives.[44]

One notable exception to his general respect for the right of individuals to make personal decisions without government interference is Justice Powell's concurrence in the five to four

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[40] 431 U.S. 494 (1977).

[41] Id. at 498 (citations omitted).

[42] 462 U.S. 416 (1983).

[43] 462 U.S. 476 (1983).

[44] Carey v. Population Services International, 431 U.S. 678 (1977).

decision that homosexual sodomy can be made illegal between consenting adults without violating the constitutional right of privacy, Bowers v. Hardwick.[45] Powell's opinion raised the possibility that a prison sentence for violating the law against sodomy might be cruel and unusual punishment, a kind of compromise which did not dispute the majority's position that the right of privacy does not protect homosexual conduct.[46]

Although in Bowers, Justice Powell did not agree with Justices Blackmun, Brennan, Marshall, and Stevens that the right of privacy protects sexual behavior between consenting adults in their own homes,[47] he has demonstrated his agreement with them that a constitutional right to privacy is principled, legitimate, and capable of application. Thus, his views are significantly different from those of Judge Bork. By replacing Justice Powell, Bork would be in a position to advance his analysis of the right of privacy. At the very least, he would shift the majority position from greater to lesser protection of privacy rights. He would affect already recognized rights in areas such as abortion and contraceptive use, and would fail to carry out the proper judicial function of applying established principles to new situations.

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[45] 106 S. Ct. 2841 (1986).

[46] Id. at 2847-48.

[47] See Bowers, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

ENTITLEMENTS, WELFARE RIGHTS, AND THE HOMELESS

Introduction

In academic writings, Judge Bork has argued that there is no constitutional right to basic subsistence needs. Recently he wrote: "I disagree with the thesis that welfare rights derive in any sense from the Constitution or that courts may legitimately place them there."[1] While the text of the Constitution does not guarantee every citizen the right to work, shelter, food, clothing, or education; it has been suggested that certain enumerated constitutional rights cannot be enjoyed when minimal subsistence needs are not met. The Supreme Court, however, has never accepted the proposition that a right to a basic level of welfare is implied by the Constitution or its amendments. What the Court has determined is that whatever government action is taken to improve the general welfare must conform to constitutional requirements. An entitlements program, for example, cannot be administered in such a way as to infringe upon the freedom of speech, or seek to establish a particular religion, or deny the due process of law. If it is, judicial review is available to invalidate it.

In contrast, Judge Bork has argued in his judicial opinions that Congress can establish entitlement programs which are utterly outside the scope of judicial review. Under Bork's

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[1] Bork, "The Impossibility of Finding Welfare Rights in the Constitution", 1979 Wash. U. L.Q. 695.

theory, the government could decide to provide food stamps to white women only, or job training for Jewish youth, and make the courts powerless to review whether such programs violate the Fourteenth Amendment. Furthermore, he has taken the extreme position that people in need of government services have no due process rights when those services are terminated. Judge Bork has twice ruled that homeless people do not have due process rights to be notified of, or have their views considered, in government decisions to close down the shelters where they had been living. This is in stark contrast to decisions in which he has sought to extend the due process rights of landlords.

In cases involving disputes over the financial administration of entitlement programs, Judge Bork has consistently ruled in favor of the federal government's position. Finally, he believes that cases involving entitlement programs, even if they raise constitutional issues, should be taken out of Federal courts altogether.

I. Judicial Review of the Constitutionality of Federal Programs

In a startling dissent, Judge Bork recently argued that Congress has the power to enact a federal statute which includes a provision that courts cannot review the constitutionality of that statute.[2] The plaintiff in the case claimed that a provision of the Medicare Act contravenes the free exercise

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[2] Bartlett ex rel Neuman v. Bowen, 816 F.2d 695, 711 (D.C. Cir. 1987) (Bork, J. dissenting).

clause of the First Amendment because it denies payment of benefits to claimants who seek post-hospital care after being treated at a Christian Science sanatorium. Bork maintained that the court lacked jurisdiction to hear the constitutional claim. In his analysis, because the Medicare Act involves government benefits, and not "affirmative government action", the doctrine of sovereign immunity applies. Thus, Bork concludes:

> for reasons of administrative necessity, constitutional rules apply differently, or may not apply at all, to benefit programs....judicial review of a constitutionally-based benefit claim may be denied by Congress.[5]

It should be noted that the two cases Bork discusses in arriving at this conclusion, Johnson v. Robison,[6] and Weinberger v. Salfi,[7] involved Court review of the constitutionality of federal benefits programs. Bork wrote the government's brief in both cases. In Robison, the Supreme Court explicitly rejected the government position that the Court had no jurisdiction to review the constitutionality of the program.[8] The Supreme Court has recently reaffirmed its Robison holding.[9] In Salfi, the Court made it clear that the Social Security Act does not preclude

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[5] 816 F.2d at 723-24.

[6] 415 U.S. 361 (1973)

[7] 422 U.S. 749 (1974).

[8] 415 U.S. at 367.

[9] See Bowen v. Michigan Academy of Family Physicians, 106 S. Ct. 2133, 2141 n.12 (1986) (serious constitutional questions would be raised by construing the Social Security Act to preclude judicial review of constitutional claims).

judicial consideration of constitutional challenges."[9] In his dissent in Bartlett, Judge Bork reiterates the arguments he made, but did not win, in the Robison and Salfi cases.

The majority opinion in Bartlett pointed out the sweeping effect Bork's position would have on federal benefit programs. They wrote:

> The dissent's sovereign immunity theory in effect concludes that the doctrine of sovereign immunity trumps every other aspect of the Constitution...Such an extreme position simply cannot be maintained. If we follow the reasoning of the dissent to its logical conclusion, Congress would have the power to enact, for example, a welfare law authorizing benefits to be available to white claimants only and to immunize that enactment from judicial scrutiny by including a provision precluding judicial review of benefit claims. We have difficulty understanding how such a law could ever be thought to be beyond judicial scrutiny because of sovereign immunity."

Although Judge Bork seemed to deny, in one footnote, that his analysis would result in benefits legislation being unreviewable,[10] in another footnote he stated that:

> The majority may be moved to state a position on this subject because of its expressed concern that application of the doctrine of sovereign immunity might permit abhorrent welfare legislation. The truth is, however, that constitutional doctrines cannot be framed to guard against every hypothetical evil.[11]

His basic position was explicit: "Sovereign immunity bars a

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[9] 422 U.S. at 762.

[10] 716 F.2d at 711, (Bork, J., dissenting).

[10] Id. at 723 n.12 ("The analysis in the text, of course, is not meant to suggest that gross classifications in benefits legislation are never found unconstitutional.")

[11] Id. at 729 n.15.

constitutional challenge to the denial of a government benefit unless Congress waives that immunity."[12] While the Constitution does not guard against every evil, Bork's view that sovereign immunity prevents judicial review of government action when entitlements are involved is extreme and, if accepted, would create a society in which the Constitution does not apply to the poor.

The Bartlett dissent is curious and unexpected for another reason. At his confirmation hearing upon appointment to the federal bench, Bork reiterated earlier Senate testimony in which he stated that the believed it would be unconstitutional for Congress to pass a statute limiting Supreme Court jurisdiction over a Federal Constitutional question.[13] His opinion in Bartlett suggests a substantial departure from that belief.

II. Homelessness and Housing Issues

Given Bork's views as elaborated in Bartlett, it is not surprising that when homeless plaintiffs challenged the city's suspension of shelter services, Bork concurred with the majority that notice of the planned closing and the opportunity for written comments satisfied due process requirements.[14] However, Bork wrote a separate opinion suggesting further that

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[12] Id. at 727.

[13] See Confirmation of Federal Judges: Hearings Before the Committee on the Judiciary, 97th Cong., 2d Sess, 6 (1982).

[14] Williams v. Barry, 708 F.2d 789 (D.C. Cir. 1983).

the homeless had no due process rights at all in this situation and to stress that there is no "constitutional or other legal right to city-provided shelter."[15] The plaintiffs were not asserting a constitutional right to shelter.[16] They were asserting the right to participate in the political process through which a decision was made to evict them. They were asserting due process rights, not minimal subsistence rights.

In a later case, when the homeless people of Washington, D.C. claimed that the closing of a federally-operated shelter was contrary to two federal statutes, a majority of the court concluded that they had jurisdiction to consider the claims and found that while the government could legally close the shelter, it also had the responsibility to provide adequate alternative shelter facilities.[17] Judge Bork wrote a separate opinion to argue that the court lacked jurisdiction to hear the case and that the government had no legal obligation to provide alternative shelter.[18]

In earlier writings, Bork has suggested that when people engage in political protest outside of the formal legal system the rule of law is replaced by an amoral power struggle. In 1971 he wrote:

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[15] 808 F.2d at 793 (Bork, J. concurring).

[16] Id. at 792.

[17] Robbins v. Reagan, 780 F.2d 37, 51 (D.C. Cir. 1985) (per curiam).

[18] Id., at 54, 59 (Bork, J. concurring and dissenting).

> Picket lines, strikes, disruptions are now becoming the common coin of political dispute, used by groups ranging from welfare recipients to women's lib. Not law but willingness to inflict inconvenience and discomfort, or sometimes worse, becomes the decisive factor in disputes.[19]

In these two homeless shelter cases, Judge Bork unsuccessfully attempted to deny homeless people the right to petition the court for redress of constitutional and statutory violations. In two other cases, he joined opinions that successfully denied homeless people the right to protest and bring attention to their plight by sitting on the White House sidewalk,[20] and by camping in Lafayette Park.[21] If, as Bork's opinions argue, the homeless have no grounds on which to bring their claims into court, and no right to demonstrate their plight to the executive or legislative branches of government, they are effectively disenfranchised.

In stark contrast, Bork has been sympathetic to an extension of the constitutional due process rights of landlords. In Silverman v. Barry,[22] he wrote the panel opinion holding that the court has jurisdiction to hear the claims of landlords seeking to invalidate a city ordinance

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[19] Bork, "We Suddenly Feel That Law is Vulnerable", Fortune, Dec. 1971 at 115.

[20] Juluke v. Hodel, 811 F.2d 1553 (D.C. Cir. 1987) (Edwards, J.).

[21] Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1985) (Scalia, J. dissenting) rev'd 468 U.S. 288 (1986).

[22] 727 F.2d 1121 (D.C. Cir. 1984) (Bork, J.).

that prevents condominium conversion. In District Properties Assoc. v. District of Columbia,[23] Judge Bork joined a unanimous opinion which held that the court has jurisdiction to hear landlords' due process claims challenging the administration of rent control laws.

Judge Bork did participate in one panel decision favorable to the poor that found that the Department of Housing and Urban Development had failed to fulfill its statutory duty to monitor and enforce regulations requiring the elimination of lead-based paint in public housing.[24]

III. The Financial Administration of Entitlement Programs

Faced with across-the-board reductions in federal funds for entitlement programs, advocates for the poor have attempted to limit the nature and effects of funding cuts. In one such case, participants in the Child Care Food program challenged a rule implementing a reduction in program expenditures. Judge Bork joined an opinion deferring to federal agency discretion.[25] In several other cases, Judge Bork has written or joined opinions determining how federal funds for entitlement programs should be allocated. In each instance his

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[23]743 F.2d 21 (Wright, J.).

[24]Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983) (Tamm, J.).

[25]Petry v. Block, 737 F.2d 1193 (D.C. Cir. 1984) (Starr, J.).

decision sided with the federal government.[26]

IV. Social Security Benefits

In two cases Judge Bork has joined opinions vindicating the statutory rights of social security benefit claimants. In both, the administration had committed obvious and indefensible errors.[27] It is Judge Bork's opinion, however, that claims arising under the Social Security Act, and other categories of disputes should be handled by a special tribunal, something like bankruptcy courts, in order to reduce the congestion of federal courts.[28]

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[26] See Maryland Department of Human Resources v. Department of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985) (Bork, J.) (Maryland misspent Title XX training funds which federal government has right to recover); Athens Community Hospital v. Schweiker, 743 F.2d 1 (D.C. Cir. 1984) (Bork, J.) (medicare provider cannot recover costs not initially included in cost report); Ambach v. Bell, 686 F.2d 974 (D.C. Cir. 1982) (per curiam) Federal education funds can be distributed using 1970 census data); Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982) (Edwards, J.) (ten states entitled to reimbursement of prior-period claims in dispute under Social Security Act); Richey Manor v. Schweiker, 684 F.2d 130 (D.C. Cir. 1982) (Bork, J.) (medicare provider not entitled to reimbursement for interest expenses or depreciation costs in conversion to non-profit status).

[27]. Vance v. Heckler, 757 F.2d 1324 (D.C. Cir. 1985) (Wright, J.) (child of deceased wage-earner sufficiently established paternity to be eligible for benefits); Ganem v. Heckler, 746 F.2d 844 (D.C. Cir. 1984) (Mikva, J.) (wife of deceased wage-earner entitled to writ of mandamus to compel Secretary to assess Iranian law in order to determine her eligibility for benefits).

[28] See Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 95th Cong., 1st Sess. 242 (1977).

Conclusion

There is nothing in Judge Bork's professional or personal background to suggest that he has any experience with, understanding of, or sensitivity to, the legal problems of the poor. Recently, Judge Bork expressed his view of the situation of poor people in this country when arguing that the Constitution does not demand recognition of a human right to basic subsistence. He wrote:

> In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done very well through it.[29]

Academically, his approach to welfare rights and entitlements issues is governed by the principle that courts should not create new rights beyond those specifically enumerated in the Constitution. Welfare rights plaintiffs, however, have not sought to create new rights through litigation. They have traditionally limited their claims to demanding that entitlement programs be constitutionally administered.[30] Judge Bork has indicated that he would deny even those claims.

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[29] Bork, "The Impossibility of Finding Welfare Rights in the Constitution", 1979 Wash. U. L. Q. 695, 701.

[30] See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires that a welfare recipient be afforded an evidentiary hearing before benefits are terminated); Shapiro v. Thompson, 394 U.S. 618 (1969) (state residency requirements violate constitutional right to travel).

THE FREEDOM OF INFORMATION ACT

Introduction

Judge Robert Bork has shown a consistent propensity to limit the ability of individuals to obtain information pursuant to the Freedom of Information Act ("FOIA"). In 25 FOIA cases coming before panels that included Bork, he has ordered the disclosure of only one document. The FOIA gives any member of the public access to the records of federal agencies unless one of nine exceptions applies. It has been essential to journalists, writers, businesses, and many groups and individuals who wish access to information in order to monitor, publicize, analyze, or simply be aware of government actions and records.

Bork has sat on approximately 25 panels reviewing FOIA requests; he has authored one majority opinion and four dissents. However, his pattern of voting is clear: he will defer to an agency refusal to disclose documents. In 20 cases, he upheld the agency's position opposing disclosure; in the remaining five cases he was largely supportive of agency positions and only required the disclosure of one document. In addition to deferring regularly to agency conclusions that their disclosure has been adequate, he has questioned the constitutionality of applying FOIA to agencies acting on behalf of the executive and he frequently raises the protection of privacy interests of third parties as grounds for non-disclosure. In addition, Judge Bork's

opposition to awarding attorneys' fees as contemplated by FOIA will inevitably deter applicants from challenging agency decisions not to disclose materials.

I. New Constitutional Limitations on Applicability of FOIA

In determining what information should be made available to the public under the FOIA, Judge Bork has argued for an extremely broad application of executive privilege. FOIA only applies to federal government agencies. As defined in FOIA, "agency" includes the Executive Office, but the Supreme Court has held that the "'Executive Office' does not include the Office of the President . . . [,and] 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA."[1] The D.C. Circuit has developed a test: if a unit's sole function is to advise and assist the President, it is not an agency.[2] Although Bork joined with the majority opinion establishing that test, in Wolfe v. Department of Health and Human Services,[3] Bork, in his dissent, seemed prepared to abandon the "sole function test" and hold that any office advising the President is exempt. "It is arguable that, insofar as OMB does directly 'advise and assist the President,' communications to and from OMB in pursuance of this function

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[1] Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980).

[2] Rushforth v. Council of Economic Advisors, 762 F.2d 1038 (D.C. Cir. 1985).

[3] 815 F.2d 1527 (D.C. Cir. 1987).

may be protected by the President's constitutional privilege."[4]

According to Bork, to the extent that an agency is advising and assisting the President, it is exempt from FOIA, even if for other purposes it is subject to FOIA.

The plaintiffs in Wolfe sought access to documents that would indicate how long the Food and Drug Administration's proposed rules were being delayed by the Secretary of Health and Human Services and the Office of Management and Budget. They also wished to know where rules were currently being considered, so that they could communicate their views to the proper agency. They did not seek disclosure of the content of the proposed rules.

In addition to expanding the statutory exception for the executive branch, in Wolfe Bork suggested a constitutional limitation as well. Bork believes that none of the three branches can constitutionally force a coordinate branch to reveal deliberations for which confidentiality is required. Bork warns that "[i]f a constitutional privilege exists that exceeds the limits of the FOIA's enumerated exemptions, this provision on its face would to that extent be unconstitutional, at least insofar as the President himself is not obviously distinct from the Executive Office of the President."[5] Thus, to the extent any agency's activity "is a delegation either of powers vested personally in the President by statute . . . or of his powers

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[4] Id. at 1539 (Bork, J. dissenting).

[5] Wolfe at 1539.

under the Constitution, it enjoys the executive's privilege of confidentiality."[6] Following Bork's analysis of the scope of executive privilege, any government official carrying out duties delegated from the President would be constitutionally protected from releasing related communications to the legislative or judicial branches of government.

II. Deference to Agencies

The typical FOIA case is brought by an individual seeking to compel an agency to produce documents. The agency responds by citing a statutory FOIA exemption and, based upon an affidavit, seeks summary judgment. The D.C. Court of Appeals has established a standard for reviewing the affidavits:

> [A]n agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.[7]

Bork has not had occasion to comment on the appropriateness standard, but seems to accept it.[8] However in applying this deferential standard, Bork does not simply defer -- he all but abdicates his role as a judge. Bork has entirely upheld agency claims in 20 cases, and largely upheld them in the remaining

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[6] Id.

[7] Goldberg v. U.S. Department of State, No. 86-5377, slip opinion, (D.C. Cir. May 8, 1987), quoting Abbotts v. Nuclear Regulatory Com'n, 766 F.2d 604 (D.C. Cir. 1985). Bork was on the panel in both cases.

[8] See Meeropol v. Meese, 790 F.2d 942, 952 (D.C. Cir. 1986).

5 cases: reversing a district court order to produce and mandating additional hearings;[9] reversing an administrative court on non-FOIA grounds and remanding so the administrative court could examine the applicability of FOIA, but suggesting that the administrative judge examine privacy concerns before requiring disclosure;[10] affirming the granting of summary judgement to several agencies in most respects, but remanding one portion of the withheld documents to enable one agency to reprocess the documents;[11] vacating summary judgment for an agency and requiring a more detailed affidavit before the documents might be withheld pursuant to the seventh exemption;[12] and ruling that a district court had properly allowed an agency to withhold two documents, but adding that the district court should have required disclosure of one document;[13] -- this is the only document Bork has actually required an agency to disclose.

Judge Bork has made it extremely difficult for FOIA plaintiffs to avoid dismissal of their claims by summary judgement. As far as Bork is concerned, almost all affidavits

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[9] Emerson v. Department of Justice, No. 85-5695, slip opinion, (D.C. Cir. June 30, 1986).

[10] American Federation of Government Employees v. Federal Labor Relations Authority, 793 F.2d 1360 (D.C. Cir. 1986).

[11] Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

[12] Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64 (D.C. Cir. 1986).

[13] Texas Independent Producers Legal Action Assoc. v. I.R.S., No. 85-5231, slip opinion (D.C. Cir. 1986).

satisfy the first part of the court test for granting summary judgment; they are reasonably specific and demonstrate a logical connection between the information and the claimed exemption. Therefore, the applicant must challenge the affidavit by either contrary evidence in the record or by evidence of agency bad faith. It is difficult to controvert the evidence: In Goldberg v. U. S. Dept. of State,[14] the State Department classified the results of a questionnaire sent to ambassadors as confidential and therefore exempt from FOIA even though the majority of ambassadors returning the questionnaire had marked their responses as unclassified; a panel on which Bork sat concluded that this did not controvert the claim in the affidavit: it was immaterial that the information originally had been labelled unclassified and had been redesignated only when sought by the applicant under FOIA.

It is equally difficult to convince Bork that there has been bad faith. In McGehee v. C.I.A.,[15] a journalist sought information regarding the mass suicide/murder at Jonestown, several weeks after the tragedy. A few weeks later, at the suggestion of the CIA the journalist narrowed his request in order to speed its processing. Nonetheless, it took the CIA two and one-half years to process the request, and when the CIA finally complied, it failed to disclose that it was using the date of the revised request as the cut-off date so that any

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[14]No. 86-5377, slip opinion (D.C. Cir. 1987).

[15]711 F.2d 1076 (D.C. Cir. 1983).

information obtained in the prior two and one-half years would not be provided. The majority found evidence of bad faith in (1) the length of time that passed before the CIA complied with the streamlined request and (2) failing to disclose the cut-off date. Bork disagreed. Bork maintained that bad faith was present only when the plaintiff can impeach the credibility of the affidavit itself.[16]

III. Protection of Business Secrets

In Greenberg v. Food and Drug Administration,[17] an attorney with the Public Citizen Health Research Group sought from the FDA a list of facilities owning a certain type CAT scanner to investigate allegations that these scanners exposed patients to dangerous levels of radiation. The manufacturer that had provided the FDA with the information said it was protected by exemption 4 which protects confidential commercial information. According to the majority, exemption 4's purpose is to protect persons who submit information from competitive disadvantage. The question therefore was whether disclosure would cause substantial harm to the manufacturer's competitive position. The majority concluded that disclosure of this information would not cause substantial harm. However, Bork's dissenting opinion argued that since the manufacturer (and its competitors)

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[16]Subsequently, the CIA requested a rehearing; in a per curiam opinion, the court concluded that the agency had not acted in bad faith.

[17]803 F.2d 1213 (D.C. Cir. 1986).

safeguarded this information from competitors, it must be valuable -- otherwise they wouldn't protect it. This reasoning presents a substantial barrier to FOIA plaintiffs. It suggests that if the agency claims that the requested documents contain trade-secrets, the plaintiffs have no means to challenge that claim.

IV. Attorneys' Fees

Bork has joined in three opinions on attorneys' fees in FOIA cases. In no case has he ruled for the applicant. In two cases he joined a ruling that the applicant had not substantially prevailed on the merits of the case and therefore was not entitled to recover any fees. In the third case, Weisberg v. U.S. Dept. of Justice.,[18] the district court had held that the applicant had substantially prevailed, citing the fact that 50,000 pages of documents on Martin Luther King eventually had been disclosed. The Court of Appeals vacated the award and remanded, finding that the district court had only provided a conclusion without inquiring whether there in fact was a causal nexus between the lawsuit and the disclosure. Moreover, even if there was a causal nexus, the court would be required to make a further inquiry to determine whether the applicant was entitled to a fee. In the second inquiry, the court was to balance four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the

[18] 745 F.2d 1476 (D.C. Cir. 1984).

applicant; (3) the nature of the applicant's interest; and (4) whether the agency has a reasonable basis in law for concluding the information was exempt. Even this would not end the examination. Attorneys' fees are not to be granted for nonproductive time or for time expended on issues on which the applicant ultimately did not prevail, even though the court explained that substantially prevail means to substantially prevail overall.

FOIA itself is much broader. Section 552(a)(4)(E) indicates that the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. The court's additional restrictions clearly will have a chilling effect. In Weisberg, the attorney had labored for 9 years to assist Weisberg's quest for information regarding the assassination of Martin Luther King. He spent approximately 800 hours on the case. As a result of his labors, 60,000 pages were disclosed. Few applicants could afford to pay for this type of service. The standards imposed by Weisberg, however, make recovery of attorneys' fees unlikely. An obstructionist agency can therefore stall long enough for the applicant to run out of money with which to pay attorneys' fees and thereby effectively end the FOIA request.

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Act ("OSHA") to a workplace where exposure to lead was so great it endangered the fetuses of pregnant workers. The employer's policy forced women of childbearing age to choose between voluntary sterilization and termination of employment. Rather than defer to the Secretary of Labor, who concluded that this policy of "fixing the worker" instead of "fixing the workplace" violated congressional intent behind OSHA, Judge Bork, writing for an unanimous panel, held that the company's fetus protection policy was not covered by OSHA because sterilization is performed outside of the workplace. Bork's opinion gave little weight to a woman's statutory right to a safe workplace without undergoing compulsory sterilization. The decision implies that fertile women can be effectively barred from workplaces where there are fetal hazards, even though as the plaintiffs contended here, the company could take measures to eliminate the hazard. Bork's reasoning also leaves open the possibility that in workplaces where dangerous materials threaten male reproductive cells, male workers could face the same choice of losing their fertility or their jobs.[z]

In another case, a construction worker whose job involved the use of various asbestos products died of asbestosis. His widow sued the corporations that manufacture or distribute asbestos products claiming negligence, breach of warranty, and

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[z] See Note, "Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace," 95 Yale L. J. 577 (1986).

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In another case, a construction worker whose job involved the use of various asbestos products died of asbestosis. His widow sued the corporations that manufacture or distribute asbestos products claiming negligence, breach of warranty, and products liability.[3] Judge Bork twice argued that the case should be dismissed before trial on procedural grounds; dissenting from the panel's decision on appeal of summary judgment, and dissenting against from the panel opinion when the case was remanded from the Supreme Court. Bork maintained that the plaintiff failed to demonstrate that her husband had been exposed to asbestos. In fact, she had letters and witnesses ready to testify that he had been employed to supervise and train crews in the use of fireproofing products that contain asbestos. In Judge Bork's view, this was not sufficient to demonstrate that the case should at least proceed to a trial. He would have dismissed the case, in the interests of

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[2]See Note, "Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace," 95 Yale L. J. 577 (1986).

[3]Catrett v. Johns-Manville Sales Corp., No. 83-1694, slip opinion (D.C. Cir. August 7, 1987), on remand from 106 S. Ct. 2548 (1986), reversing 756 F.2d 181 (1985).

securing a "just, speedy, and inexpensive determination of every action"[4] without allowing the plaintiff to present her evidence at trial. In this opinion, Judge Bork sought to increase the plaintiff's burden of proof, at a pretrial stage of litigation, a step that would not only dismiss the plaintiff's claim in this case but also make it more difficult for future plaintiffs; all without full consideration of the merits of the case.

Workplace safety was also at issue in Prill v. National Labor Relations Board,[5] where a driver was fired after refusing to drive a tractor-trailer which he knew to have faulty brakes and other unsafe features. The majority of the panel found that the worker could be protected under the National Labor Relations Act, particularly since the worker and the employer were under a legal obligation not to operate the vehicle. Judge Bork, in dissent, argued that the driver's actions were not protected under the National Labor Relations Act because he acted individually rather than in a concerted effort with other employees. This reasoning could prevent all workers, such as truck drivers, who work alone rather than in a factory or other single location, from asserting their rights to safe working conditions.

In McIlwain v. Hayes,[6] Judge Bork wrote for the majority, holding that the Commissioner of the FDA's extension of the closing dates for manufacturers to prove the safety of food color additives was within his lawful authority and discretion. In 1960, Congress had passed the Color Additive Amendments to the Food, Drug and Cosmetic Act which required manufacturers using additives to prove their safety. While the 1960 Act provided

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[4] Catrett, slip opinion at 6.

[5] 755 F.2d 941 (1985).

[6] 690 F.2d 1041 (D.C. Cir. 1982).

the Commissioner with the power to postpone the closing dates from time to time, over twenty years later the additives in question had not been found safe. In spite of the over twenty-year delay, the Commissioner allotted another two and one-half year postponement for compliance with the Act. In his dissent, Judge Mikva criticized the majority affirmance of the postponement in light of the clear congressional intent that the transitional provisions be used "on an interim basis for a reasonable period."[7]

The one time that Judge Bork did write an opinion which may promote the health and safety of individuals, the facts of the case mandated that result on grounds other than health concerns.[8]
Judge Bork wrote for the majority, affirming a district court injunction prohibiting a cigarette manufacturer from advertising that FTC studies had found the cigarette to contain 1 mg of tar. Judge Bork noted that because the FTC later found its 1 mg of tar finding to be erroneous, continued use of that finding by the manufacturer in its advertising was misleading.

II. Regulation of Nuclear Power Plants

Judge Bork has deferred to the discretion of the Nuclear Regulatory Commission in its licensing of nuclear power plants in the face of opposition from public interest groups concerning safety factors. In San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission,[9] Judge Bork wrote for the majority, en banc, which affirmed the issuance by the NRC of low power and full power licenses to a nuclear power plant located three miles near an active earthquake

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[7] 690 F.2d at 1052.

[8] Federal Trade Commission v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).

[9] 789 F.2d 26 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 330 (1986).

fault, in spite of claims by public interest groups that the commission failed to gather adequate evidence concerning the seismic risks and emergency procedures. Judge Bork thought it highly unlikely that an earthquake might occur at the same time that there was a nuclear accident at the plant. Judge Wald, dissenting, argued that the refusal to consider evidence caused by earthquakes was "inexplicable in legal, logical, or common sense terms."[10] Similarly, in Carstens v. Nuclear Regulatory Commission,[11] Judge Bork joined in an opinion written by Judge Starr upholding the NRC's granting of a license to a nuclear power plant located in an area of seismic activity in Southern California.

Judge Bork's position of favoring the NRC in the face of opposition from public interest groups to the proliferation of nuclear power plants without adequate safeguards, extends not only to the licensing of such plants themselves, but also to the on-going debate concerning continuing safety problems with the plants. In Bellotti v. U.S. Nuclear Regulatory Commission,[12] for example, Judge Bork, writing for the majority, severely curtailed the ability of the public to intervene in nuclear license amendment proceedings under the Atomic Energy Act. Judge Bork held that the Attorney General

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[10] Id. at 60.

[11] 742 F.2d 1546 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136 (1985).

[12] 725 F.2d 1380 (D.C. Cir. 1983).

for the State of Massachusetts had no standing to intervene on behalf of the people of Massachusetts in an NRC enforcement proceeding that involved the license amendment of the nuclear power station. The proceeding had been developed and ordered by the NRC's Office of Inspection and Enforcement in response to severe safety problems uncovered at the station. Yet, in finding that the Attorney General had no standing to intervene Judge Bork wrote that the intervention of the Attorney General would "expand many proceedings into virtually interminable, free-ranging investigations."[13]

III. Environmental Protection

In the environmental area, Judge Bork has generally favored the governmental regulatory agencies over the claims of individuals and public interest groups requesting more vigilant governmental regulation in order to protect the environment or the health and safety of individuals. In Sierra Club v. U.S. Department of Transportation,[14] Judge Bork rejected the arguments of the Sierra Club that the Federal Aviation Administration improperly granted operation amendments to two commercial airlines to service the Jackson Hole Airport. The plaintiffs

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[13] 724 F.2d at 1381; see also Oystershell Alliance v. U.S. Nuclear Regulatory Commission, 800 F.2d 1201 (D.C. Cir. 1986) (in per curiam opinion, Judge Bork joined the panel which found two pending motions before the Atomic Safety and Licensing Appeal Board to reopen the record on the licensing of a plant did not preclude the NRC from undertaking a separate review in order to issue an immediately effective full power operating license).

[14] 752 F.2d 120 (D.C. Cir. 1985).

alleged that an updated Environmental Impact Statement ("EIS") had to be filed under the National Environmental Policy Act. The plaintiffs also argued that the Department of Transportation was required to consider possible alternatives under the Transportation Code. The airport was located in a national park. Finding that an EIS filed in 1980 was adequate and that the airport had been operating for over forty-five years and had allowed commercial jets to land for the last two, Judge Bork held that updating the EIS would not be required. He also held that the Transportation Code requirement that possible alternatives be considered did not apply to changes in flight scheduling.

Similarly, in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,[1] Judge Bork rejected the claim of the Natural Resources Defense Council ("NRDC") that, under the Clean Air Act, the EPA may consider no factors other than health in setting the level of regulation of hazardous pollutants such as vinyl chloride. After reviewing the legislative history and searching for the congressional intent, Judge Bork upheld the use by the agency of factors such as economic and technological feasibility, holding that the agency had some discretion in setting regulations and that its choice was a reasonable one under the statute. The dissent criticized the majority's interpretation that the statutory provision

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[1] 804 F.2d 710 (D.C. Cir. 1986), reversed on rehearing en banc, No. 85-1150 slip op. (July 28, 1987).

authorized consideration of economic and technological feasibility, where the statute clearly directed the "EPA Administrator to establish an emission standard 'at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutants.'"[16]

In an interesting turnabout of position, Judge Bork subsequently wrote for the unanimous court upon en banc rehearing and reversal of his earlier decision in Natural Resources.[17] In this second opinion, Judge Bork again rejected the NRDC's position that only health-related factors could be considered, but also rejected the EPA's position that it could rely solely upon economic and technological feasibility in setting regulatory standards. Judge Bork changed his position and his interpretation of the legislative intent in holding in the en banc opinion that the Administrator "ventured into a zone of impermissible action" by "substitut[ing] technological feasibility for health as the primary consideration . . . contrary to clearly discernible congressional intent." Noting that "[e]very action by the Administrator in setting an emission standard is to be taken 'to protect public health,'" Judge Bork's opinion vacated the Administrator's decision and remanded it for reconsideration. Faced with a unanimous court upon en banc rehearing, Judge Bork's about-face in his interpretation of the

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[16]704 F.2d at 728.

[17]No. 85-1150 slip op. (D.C. Cir. July 28, 1987) (en banc).

clear congressional intent is particularly noteworthy.

IV. Attorney's Fees

The question of how much public interest attorneys should be paid was at issue in Save Our Cumberland Mountains, Inc. v. Hodel.[18] Judge Bork wrote the majority opinion limiting their fees to the average hourly rate they charged during the relevant time period, even though attorneys in a public interest practice commonly charge their clients based on the client's ability to pay rather than at prevailing market rates. Judge Wald, dissenting in part, argued that Bork's reasoning was "jurisprudential absurdity" and that it discouraged the practice of public interest law. She wrote:

> Most disturbingly, the panel's theory produces strong disincentives to young lawyers trying to make public interest-type practice work. Large, wealthy private firms will receive top dollar in statutory fees compensation for the occasional pro bono case they take. Nonprofit legal services organizations with salaried employees will also receive fees based on the top market rate for lawyers of similar qualifications and experience. But struggling private-public interest attorneys who purposefully charge their poorer clients for services at cut-rates but who must yet depend upon those rates for their livelihood will receive those same cut-rates as statutory fees. Clearly, Congress did not intend such an arbitrary disparity when it enacted provisions allowing reasonable attorneys' fees in order to induce high quality representation from the private bar.[19]

Judge Bork's conservatism in interpreting the scope of

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[18] No. 85-5984, slip op. (D.C. Cir. August 7, 1987).

[19] Id., slip op. at 9.

the environmental laws is also exhibited in his denial of attorney's fees and costs to claimants under the environmental acts. In Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority,[20] Judge Bork, writing for the majority, held that corporate plaintiffs lacked standing to recover costs under the Clean Water Act. Similarly, in Business and Professional People for the Public Interest v. Nuclear Regulatory Commission,[21] Judge Bork wrote in the majority opinion that a not-for-profit public interest corporation was not entitled to recover fees and expenses in connection with its intervention in a proceeding funded in part by the Energy and Water Development Appropriations Act.

V. Other Cases

A prevailing theme through all Judge Bork's decisions in this area in his willingness to defer to the regulatory or administrative agencies. In Oil, Chemical and Atomic Workers International Union v. Zegeer,[22] Bork joined a majority opinion upholding the Mine Safety and Health Administration's delay in releasing rules concerning permissible level of radon danger to which underground miners may be exposed where completion of rule making was proceeding within a reasonable time. In National Wildlife Federation v. Gorsuch,[23] Bork joined the majority which

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[20] 765 F.2d 1169 (D.C. Cir. 1985).

[21] 793 F.2d 1366 (D.C. Cir. 1986).

[22] 768 F.2d 1480 (D.C. Cir. 1985).

[23] 693 F.2d 156 (D.C. Cir. 1982).

upheld the Environmental Protection Agency's interpretation that the National Pollution Discharge Elimination System permit program excludes dam-caused pollution and which reversed lower court finding of a violation by EPA administrator in failing to regulate discharge of pollutants from dam. Bork was on the panel in National Resources Defense Council, Inc. v. Environmental Protection Agency,[24] a per curiam decision upholding a EPA rule establishing recommended maximum contaminant level for fluoride under the Safe Drinking Water Act where level set by EPA was rational and sufficiently low to prevent crippling skeletal fluorosis even among susceptible individuals. In Committee of 100 v. Hodel,[25] Bork joined the majority which upheld a proposed exchange of real property between a private developer and the National Park Service, finding that the determination by Park Service that properties were of approximately equal value did not require a public hearing and was reasonable. Bork wrote the opinion for the majority in Coalition for the Environment v. Nuclear Regulatory Commission,[26] holding that a NRC rule eliminating case by case review of financial qualifications for certain utilities seeking operating licenses was not arbitrary and capricious and that the Atomic Energy Act did not require an individualized showing of financial capabilities. Again writing for the majority, Judge Bork's opinion in Donovan v. Carolina

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[24] 812 F.2d 721 (D.C. Cir. 1987).

[25] 777 F.2d 711 (D.C. Cir. 1985).

[26] 795 F.2d 168 (D.C. Cir. 1986).

Stalite Co.,[27] reversed the district court's decision reversing civil penalties imposed by the Federal Mine Safety and Health Review Commission, and held that a state gravel processing facility which did not extract the slate it processed but was operationally integrated with a plant which was subject to the Federal Mine Safety and Health Act, was also subject to the Act. In General Electric Uranium Management Corp. v. U.S. Department of Energy,[28] Bork joined the majority opinion upholding the Department of Energy's rule setting a one-time fee for disposal of spent nuclear fuel, finding that the Department of Energy rule was a reasonable exercise of its discretion under the Waste Act.

Conclusion

While in the environmental area, Bork's opinions for the most part have been majority decisions, several were issued with strong dissenting opinions as well. Most disturbing is Judge Bork's disregard for the health and safety needs of workers. In addition, his rulings that restrict or deny attorney's fees under environmental protection laws will discourage the practice of public interest law in this area.

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[27] 734 F.2d 1547 (D.C. Cir. 1984).

[28] 764 F.2d 896 (D.C. Cir. 1985).

CRIMINAL LAW AND THE DEATH PENALTY

I. Criminal Law

To date Judge Bork has participated in 26 criminal cases, deciding in favor of the prosecution in 24 of those cases. His opinions suggest that he would narrow application of the exclusionary rule, and generally approve rules of evidence which are advantageous to the prosecution and deny individual rights.

In United States v. Singleton,[1] Judge Bork wrote a majority opinion joined by Judge Scalia, holding that crucial evidence as to identification of the defendant which the trial judge found to be legally inadmissible on due process grounds should be admitted at a new trial. The trial judge emphasized that the police conduct in presenting the defendant to the witnesses collectively, shortly after the robbery was committed, with articles used in the robbery but not found on the accused, was "a clear-cut example of the dangerous potential of the one-man 'show-up' for tragic misidentification."[2] The show-up identifications were later contradicted by the independent recollections of the witnesses. Judge Bork ruled, however, that their show-up identifications should be admitted as evidence. Judge Swygert dissented, arguing that Judge Bork's opinion

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[1] 759 F.2d 176 (D.C. Cir.), rehearing en banc denied, 763 F.2d 1432 (1985).

[2] 763 F.2d at 1435.

"ignores the most fundamental premises and policies of evidence law."[3] Bork used procedural arguments to avoid consideration of the due process concerns underlying current Supreme Court decisions that exclude unreliable, suggestive identifications of defendants. He held that because an appeals court had ruled that the evidence was sufficient to convict, the trial court on remand was barred from considering the admissibility of the evidence. However, this argument ignores the important distinction between the admissibility of evidence, and its sufficiency to prove guilt.

In dissenting from denial of rehearing, Judges Wright and Mikva commented that it was fundamentally unfair to allow use of the show-up identification as evidence, and even the judges voting against rehearing of the case felt it "difficult to subscribe to the panel's decision in this case."[4] Judge Bork went to great lengths in this case to prevent the trial court from making the initial determinations about admissibility of evidence that are ordinarily considered within its sound discretion to make.

In United States v. Mount,[5] Bork wrote a separate concurring opinion to elaborate his views on the exclusionary rule beyond what was required to decide the case. The defendant in Mount argued that the exclusionary rule should apply to evidence

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[3] 759 F.2d at 184.

[4] 763 F.2d at 1432.

[5] 757 F.2d 1315 (D.C. Cir. 1985).

seized by British police during a warrantless search of his home in Britain. The rule in other circuits is that United States courts will not exclude evidence seized by foreign law officers outside the U.S. unless the evidence was gathered in such a way that it shocks the judicial conscience. Rather than agree with the majority that the evidence in this case was not seized in a shocking manner, Judge Bork found it appropriate to criticize the rule itself, arguing that courts do not have any power to exclude evidence gathered abroad, no matter how outrageously obtained, short of evidence obtained from beatings, torture, or other physical abuse.

In addition, Bork expressed his view that use of the exclusionary rule is not warranted in circumstances in which "application of the rule does not result in appreciable deterrence of unlawful police conduct." In his concurring opinion, Bork flatly states that "deterrence is now essential before exclusion can ever be appropriate under the Fourth Amendment."[6] Although in line with the Supreme Court's recent decision, this reading of the Fourth Amendment, which establishes "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[7] ignores the fundamental connection between the

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[6] Id. at 1321.

[7] U.S. Const. amend. IV.

right to be free from invasions of privacy and the right to exclude evidence wrongfully obtained.

Bork elaborated on his concurrence in Mount in the course of his interview in Judicial Notice. He identified two possible rationales for the exclusionary rule: deterrence of unconstitutional police behavior; and the principle that "courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence."[8] He rejected the latter as unconvincing.
Notably lacking is any understanding of the individual's right to privacy as a justification for the rule.

II. Criminal Punishments and the Death Penalty

In Judge Bork's view, not only the death penalty, but any punishment acceptable in 1789 is constitutional today. Moreover, Bork's theory implies that there is no need for the punishment to be proportional to the crime. The Supreme Court has repeatedly held that the Eight Amendment's prohibition of cruel and unusual punishment must be interpreted according to "the evolving standards of decency which mark the progress of a maturing society," so that a certain form of punishment accepted by the Framers of the Amendment may nevertheless be unconstitutional today.[9] In addition, a series of cases has established that the

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[8] "An Interview with Robert H. Bork", Judicial Notice, (reprint June 1987) at 6.

[9] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

punishment must not "involve the unnecessary and wanton infliction of pain," nor be "grossly out of proportion to the severity of the crime."[10] If he adheres to the strict constructionist view of the Eighth Amendment that he has so far defended, Judge Bork must reject these propositions.

Judge Bork finds the death penalty to be a constitutionally permissible form of punishment. In 1986 he stated:

> Well, I think for an interpretivist, the issue is almost concluded by the fact that the death penalty is specifically referred to, and assumed to be an available penalty, in the Constitution itself. In the Fifth Amendment and in the Fourteenth Amendment. It is a little hard to understand how a penalty that the framers explicitly assumed to be available can somehow become unavailable because of the very Constitution the framers wrote.[11]

Judge Bork went on to question whether the Eighth Amendment contains an evolving standard:

> I suppose the noninterpretivists would proceed, as some of them have, by saying, "Well, the standard, for example, of what is a cruel and unusual punishment under the Eighth Amendment is an evolving standard. It moves with the society's new consensus about what is consistent with human dignity, what is too cruel, etc., etc." And then they say that evolving standard has now reached the death penalty, and eliminates it. But it is not made clear why the standard should evolve.[12]

However, at the time the Eighth Amendment was written, ear cropping, flogging, branding, mutilation, and disembowelment

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[10] Id. at 173.

[11] "An Interview with Robert H. Bork", supra note 8, at 5.

[12] Id. at 5-6.

were also state-sanctioned punishments, sometimes even for minor offenses.[13] Since mutilation was acceptable in 1789, and if the Eighth Amendment does not establish an evolving standard of decency, would Judge Bork then uphold against an Eighth Amendment challenge, a state law imposing these barbaric punishments?

It is unclear whether Judge Bork accepts the proposition that the framers of the Eighth Amendment intended to include a requirement that the punishment be proportional to the crime. This is also a salient issue today. The Supreme Court has held the death penalty to be excessive punishment for rape of an adult woman,[14] for kidnapping,[15] and for some felony-murders.[16] Under the interprevist view that proportionality to the crime is not part of the cruel and unusual standard, the death penalty would be constitutional for any offense for which it could have been imposed in 1789, and that includes most felonies. Moreover, suggestions like Justice Powell's in Bowers v. Hardwick,[17] that incarceration for the crime of private, consensual sodomy may be excessive, would be rejected by Judge Bork.

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[13] See R. Berger, Death Penalties: The Supreme Court's Obstacle Course 41, 113, 118 (1982).

[14] Coker v. Georgia, 433 U.S. 584 (1977).

[15] Eberheart v. Georgia, 433 U.S. 917 (1977).

[16] Enmund v. Florida, 102 S. Ct. 3368 (1982).

[17] 106 S. Ct. 2841, 2847-48 (1986) (Powell, J., concurring).

In short, Judge Bork clearly believes that the death penalty is a constitutional form of punishment. It is less clear whether, in his view, there are any crimes for which it may be an unconstitutional punishment because it is excessive. Given the forms of punishment which were acceptable when the Eighth Amendment was drafted, Bork's view suggests that the Amendment does not establish limitations on punishments which, by today's standards, are excessively brutal and inhumane.

SPECIAL PROSECUTORS AND THE ETHICS IN GOVERNMENT ACT

Introduction

Judge Robert H. Bork believes that the appointment of a special prosecutor (independent counsel) by someone outside the executive branch is an unconstitutional usurpation of executive authority. He made his views clear while testifying before the House and Senate Judiciary Committees in his capacity as Acting Attorney General shortly after dismissing special Watergate prosecutor Archibald Cox in 1973. In his identical opening statements to the House and Senate, Judge Bork said:

> The question is whether congressional legislation appointing a Special Prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid . . . I am persuaded that such a course would almost certainly not be valid . . . .[1]

Bork's denial of Congressional power to determine which branch of government will appoint a special prosecutor must be considered in the context of his role at that time. In 1974, the firing of Archibald Cox was one of the grounds for impeachment of President Nixon.[2] In addition, a district

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[1] Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J. Res. 784 and H.R. 10937 before Subcommittee on Criminal Justice of House Judiciary Committee, 93rd Cong., 1st Sess. 251, 252 (1973) (testimony of Robert H. Bork, Acting Attorney General of the United States); Special Prosecutor: Hearings Before Senate Judiciary Committee, 93rd Cong., 1st Sess. 449, 450 (1973) (testimony of Robert H. Bork, Acting Attorney General of the United States).

[2] Senate Comm. on the Judiciary, 93d Cong. 2d Sess., Impeachment of Richard M. Nixon, 2, 8, 179-181 (Aug. 20, 1974).

court judge ruled that Bork's firing of Cox was illegal.[3]

Bork's justification of executive control over the prosecutorial power along with denial of any Congressional power would effectively put the President above the rule of law. Today, his view implies that the Ethics in Government Act, which authorizes the court to appoint an independent counsel,[4] is unconstitutional. Judge Bork elaborated his constitutional interpretation of this issue in a recent case which challenged the refusal of the Attorney General to appoint a special prosecutor to investigate FBI involvement in killings which occurred when the Klan and Nazi party attacked demonstrators in Greensboro, North Carolina in 1979.[5]

Judge Bork's conclusion that the court cannot appoint a prosecutor rests upon a strict interpretation of the Constitution's text and a rigid conception of the principle of separation of powers, along with a belief in executive primacy. As far as he is concerned, these considerations override the goal of avoiding conflicts of interest during investigations of executive branch officials.

I. Constitutional Powers to Prosecute

As Bork reads the Constitution, only a member of the executive branch can appoint a special prosecutor because only the executive is directed by the Constitution to "take care

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[3] Nader v. Bork, 366 F.Supp. 104 (1973).

[4] 28 USC § 47, 591-98 (1978).

[5] Nathan v. Smith, 737 F.2d 1069 (1984).

that the laws be faithfully executed." He explained his understanding of the Constitution to the House and Senate in 1973:

> [T]he Constitution of the United States makes prosecution of criminal offenses an executive branch function . . . The only reference to prosecutorial powers is in article II, section 3, which states that the President "shall take care that the laws be faithfully executed." Article II, section 2, gives the President "Power to Grant Reprieves and Pardons for Offenses against the United States." This power too, indicates that the Constitution lodges in the executive branch complete control over criminal prosecution.[6]

For Bork, it is self-evident that this language places the power to prosecute solely in the hands of the executive.

Although Bork is convinced that article II, section 3 precludes any other branch from handling criminal prosecutions, his colleagues on the D.C. Circuit disagree. In In re: Olson[7], a three judge panel of the D.C. Circuit held that article II, section 3 "does not require the President (or his delegate) to 'execute the laws.'" The court reasoned that:

> The President's responsibility may be satisfied by Congress entrusting the power of execution to some other officer while the President's obligation would be satisfied by the right of the President (or his delegate) to remove the individual officer for impropriety.[8]

Essentially, the Court refuted Bork's narrow construction of article II, section 3 by concluding that the President does

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[6] House hearings supra note 1 at 253; Senate hearings supra note 1 at 451.

[7] 818 F.2d 34.

[8] Id. at 44.

not have to execute the laws himself if he can fire those who do. As long as the President retains a measure of oversight, he fulfills his duty to "take care."

The primary argument countering Bork's position, besides challenging his interpretation of article II, section 3, incorporates two additional constitutional provisions. First, article II, section 2 (the "appointments" clause) states:

> But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Second, article I, section 8 (the "necessary and proper" clause) empowers Congress:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.

Each of these provisions offers a plausible textual basis for the creation of a special prosecutor independent of the executive branch. A defensible construction of the "appointments" clause says that a special prosecutor is an "inferior officer" whom Congress could direct the courts to appoint. Therefore, a duly enacted law creating a court-appointed special prosecutor reasonably could be deemed a "necessary and proper" exercise of the congressional power to vest the appointment of inferior officers as it sees fit.

Taken together, both the "appointments" clause and the "necessary and proper" clause expressly give to Congress broad

powers which arguably allow it to prescribe the process by which a special prosecutor is appointed. Indeed, in Olsen, the Court directly supported this view. The court defended the legitimacy of the Ethics in Government Act by writing:

> The statute authorizing the court to appoint independent counsel to prosecute violations of the criminal law involving high government officials is grounded in the 'necessary and proper' clause and the Article II appointments clause of the Constitution.*

Thus, there is a legal precedent from Bork's own circuit invoking the "appointments" clause and the "necessary and proper" clause to uphold the Office of Independent Counsel. Bork, opposing the D.C. Circuit in Olsen, the ABA, and constitutional scholars such as Laurence Tribe and Philip Heymann, remains convinced that these provisions offer no support for the creation of a special prosecutor outside the executive branch. He finds the argument that the "appointments" clause and the "necessary and proper" clause offer a constitutional basis for a court-appointed special prosecutor specious.

He dismissed article II, section 2 before the House and Senate in 1973 by invoking the framers' intent:

> This provision was added with little or no debate toward the end of the Constitutional Convention. It is impossible to believe that as an afterthought, and without discussion, the framers carelessly destroyed the principle of separation of powers they had so painstakingly worked out in the course of their deliberations.
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> It seems as clear as such matters ever can be that the framers intended to give Congress the power to vest in the courts the power to appoint "inferior officers" such as clerks, bailiffs, and similar

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*. Id.

> functionaries necessary to the functioning of courts, just as they intended "Heads of Departments" to be able to appoint most of their subordinates without troubling the President in every case. The power is clearly one to enhance the convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the executive to the judiciary or, for the matter of that, transferring the powers of the judiciary to the executive.[10]

Of course Bork can only guess at what the framers intended, since they never defined the term "inferior officer". An equally tenable theory is that they added the "appointments" clause not only "to enhance the convenience of administration," as Bork asserts, but also to institute another congressional check in the system of checks and balances which could evolve as the government grew more complex. Thus, even under Bork's strict interpretivism, his conclusion is debatable.

Next, Bork attacked the applicability of the "necessary and proper" clause with an appeal to the logic of having three separate branches of government:

> I take it that no one suggests the power to create a Special Prosecutor outside the executive branch is found among the enumerated powers such as the power to regulate commerce or to lay and collect taxes. The theory, therefore, must be that the power to make laws necessary and proper for the enforcement of the laws includes the power to remove law enforcement from the executive branch.
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> If the necessary and proper clause were read in that fashion it would be a power lodged in Congress that swallows up much of the rest of the Constitution . . .
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> The necessary and proper clause must be read as a means of making the exercise of powers by the various

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[10]House hearings, supra note 1, at 254; Senate hearings, supra note 1, at 452.

> branches effective, not as a means of shifting powers between the branches of government. Thus Congress may create or abolish various positions within the Department of Justice. It may provide or take away jurisdiction. It may pass or repeal substantive laws. It may appropriate funds or not as it sees fit. But all of this does not add up to a theory that it can keep the laws but forbid the executive branch to enforce them and transfer the enforcement function to itself or to the courts.[11]

Bork analyzes the "necessary and proper" clause by placing it in a vacuum, instead of assessing it in conjunction with the "appointments" clause. This is the only way he can say that Congress's exercising the "necessary and proper" clause to authorize a court-appointed special prosecutor amounts to a "shifting of power between branches." Otherwise, he would have to overcome the argument that Congress is merely employing a "necessary and proper" means to exercise its own constitutional power to vest the appointment of an inferior officer. By divorcing the "appointments" clause from the "necessary and proper" clause, Bork never honestly confronts the argument that together they sanction Congress's decision to permit the court to appoint a special prosecutor.

Along with Bork's originalist approach to the Constitution's text, his unyielding formulation of the separate function of each branch of government explains his contention that the special prosecutor must be created and maintained by the executive branch. He views a special prosecutor appointed independently from the executive not as a narrowly tailored

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[11] House hearings, supra note 1, at 255; Senate hearings, supra note 1, at 453.

means of avoiding impropriety during investigations of executive officials, but instead as a much larger, more vitiating seizure of executive power amounting to a destruction of the principle of separation of powers.

This belief that the three branches of government are distinct entities whose powers cannot overlap has been rejected by both the Supreme Court and Bork's own Circuit. The D.C. Circuit in Olsen, citing the seminal Supreme Court case Buckley v. Valeo, ruled that the Ethics in Government Act:

> is as fully consistent with the separation of powers doctrine of the Constitution . . . as it is a commonplace that the Constitution does not 'contemplate total separation of each of the three essential branches of government.'[12]

Thus, Bork's notion that the special prosecutor must remain within the executive branch because the branches are wholly independent is at least controversial and at worst incorrect.

II. Bork's Nathan v. Smith[13] Opinion

The private plaintiffs in Nathan did not question the constitutionality of the office of independent counsel, but rather sought to compel an investigation. The per curiam panel opinion decided the case on the narrow grounds that the plaintiffs failed to supply the Attorney General with sufficient specific information to require an investigation.[14] While Judge

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[12] Olsen, 816 F.2d at 88.

[13] . 737 F. 2d 1069 (D.C. Cir. 1984). This case is also discussed in the Separation of Powers section, infra, at 115-116 and in the Access to Courts section, infra at 126.

[14] Id. at 1070.

Bork's concurring opinion did emphasize that the Ethics in Government statute does not give private parties the right to compel prosecution,[15] he went on to discuss the constitutional grant of prosecutorial powers.

Bork stressed that "the principle of Executive control extends to all phases of the prosecutorial process,"[16] suggesting that the validity of a court-appointed special prosecutor, even at the request of the Attorney General, may violate the constitutional principle of separation of powers. Moreover, Bork stated that:

> If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.[17]

III. The Implications of Bork's View

In summary, nothing indicates that Judge Bork has changed his opinion, expressed in 1973, that the special prosecutor must be appointed by, and remain under the control of, someone within the executive branch of government. Therefore, he would likely find the current Ethics in Government Act unconstitutional, since it empowers the court to appoint an independent counsel. There

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[15] See also Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (per curiam decision in which Judge Bork participated, holding that private citizens cannot seek judicial review of Attorney General's decision not to investigate allegations of wrongdoing during 1980 Presidential campaign by persons who are now high ranking government officials.)

[16] Nathan, 737 F.2d at 1079.

[17] Id.

have been several recent challenges to the constitutionality of the Ethics in Government Act, including those filed by Colonel North, Admiral Poindexter, Michael Deaver and Lyn Nofziger, and the Supreme Court has never ruled on this issue. Thus, Bork's view could have significant weight should he become a Supreme Court Justice. A finding by the Supreme Court that the Ethics in Government Act is unconstitutional would eliminate the Office of Independent Counsel. This would curtail impartial investigations into criminal wrongdoing by executive branch officials because it would leave investigations solely in the hands of the Attorney General, in effect allowing the fox to guard the henhouse.

FOREIGN AFFAIRS

Introduction

Judge Bork's opinions pertaining to matters of foreign policy reflect his view that the President retains broad authority under the Constitution to conduct the nation's foreign policy and that separation of powers principles dictate judicial restraint in this area. While many may share this view in general, Judge Bork takes this position to extreme lengths. For example, participating in a 1971 symposium on the legality of United States action in Cambodia, Bork boldly declared:

> I think there is no reason to doubt that President Nixon had ample constitutional authority to order the attack upon sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. That authority arises both from the inherent powers of the Presidency and from Congressional authorization. The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President.[1]

Judge Bork's opinions on the appellate court, though written more than ten years subsequent to the 1971 symposium, involving issues ranging from Palestinian terrorism to military activity in Central America, expound upon the themes raised by Bork in the context of the Vietnam conflict. In every instance, the result of Bork's rulings

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[1] Comments, "Symposium on United States Action in Cambodia", 65 Am. J. Int'l L. 1, 79-81 (1971).

has been to further the President's foreign policy goals, even if those goals are arguably contrary to national or international law. The means by which Bork implements his view on the role of the judiciary in foreign policy is often to deny access to the court on grounds of lack of standing or lack of subject matter jurisdiction.

I. Congressional Challenges to Presidential Action

Judge Bork has expressed the view that the War Powers Resolution[2], which requires the President to consult with Congress when possible before introducing U.S. forces into hostile situations; and to report to Congress within 48 hours if an emergency situation requires the deployment of armed forces without prior consultation, is "probably unconstitutional and certainly unworkable."[3] In his view, the Resolution violates the separation of powers principle by giving Congress too much control over the conduct of the Armed Forces. However, when cases involving the War Powers Resolution have come before Judge Bork, he has dealt with them on procedural grounds, defeating the purpose of the Resolution without directly ruling it unconstitutional.

Lack of standing was the grounds on which Judge Bork resolved the dispute in his concurring opinion in Crockett v. Reagan.[4] The case was brought by 29 members of Congress,

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[2]50 U.S.C. 1541-1548 (1982).

[3]Wall Street Journal, Mar. 9, 1978.

[4]720 F.2d 1355 (D.C. Cir. 1983).

challenging the legality of the United States presence in and military assistance to El Salvador under the War Powers Resolution and the Foreign Assistance Act of 1961. Bork argued that they had no standing to sue because they suffered no injury. He wrote:

> Congressional plaintiffs here have lost no part of their right to vote and thus have not suffered the "judicially cognizable injury" . . . necessary to give them standing. I also adhere to my view that separation--of-powers considerations are properly addressed as part of the standing requirement.[m]

The last statement is particularly significant in that Judge Bork prefers to address separation of powers questions first through the requirement of standing, thus keeping certain issues, including those pertaining to legislative involvement in foreign affairs, out of court in the first place. Traditionally, separation of powers concerns would be raised either through the doctrine of equitable discretion, which provides for judicial restraint when a legislator's quarrel with the Executive is in fact best characterized as a quarrel with a fellow legislator; or through the nonjusticiable political question doctrine. The majority in Crockett dismissed the legislators' claims under the Foreign Assistance Act and the War Powers Resolution on equitable discretion and political question grounds.

Bork's opinion in Crockett suggests that Congressmen seeking to enforce the War Powers Resolution in a situation

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[m] Id. at 1357.

where they believe U.S. Forces' operations have been carried out in violation of the Resolution, in the Persian Gulf, for example, cannot go to the courts. It is unclear what they can do to assert their claim that the President is violating the law.

In contrast, the majority in Crockett allowed congressional standing and left open the possibility that in the future, with a clear indication that Congress expected the War Powers Act to apply to a particular situation and an equally clear refusal of the President to comply, judicial interpretation of the Resolution could serve to resolve the impasse. The majority then, decided the Crockett case in such a way that left open the possibility of reaching a different result on different facts. Judge Bork's view would bar any such case from the courts altogether.

A jurisdictional argument also formed the basis of the decision in Conyers v. Reagan,* where Judge Bork joined a per curiam opinion holding that the plaintiff's claim was moot. The suit was brought by eleven Congressmen seeking declaratory relief under the War Powers Clause of the Constitution with respect to the United States invasion of Grenada. The opinion by Judge Tamm drew a distinction between the "unilateral invasion of Grenada as a deprivation of the appellants' right to commit United States

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*765 F.2d 1124 (D.C. Cir. 1985).

forces to a war of aggression," and the "defendants' power to control the deployment of military personnel in peaceful circumstances."[7] The opinion concluded that the latter characterization applied to the Grenada situation in 1985 and thus, the appellants' claims were no longer relevant.

II. Individual Suits Against Foreign Governments

In Tel-Oren v. Libyan Arab Republic,[8] Judge Bork wrote a concurring opinion upholding the district court's dismissal, on grounds of lack of jurisdiction, of a claim against Libya and several Arab and Palestinian groups brought by American and Israeli survivors of a Palestinian armed attack on an Israeli bus. The case essentially required the court to determine under what circumstances victims of terrorist attacks in foreign countries can sue their assailants for compensatory and punitive damages in American courts. Judge Bork's concurring opinion compels the conclusion that no such suits can ever be maintained.

The plaintiffs claimed the right to sue under a 1789 statute conferring federal jurisdiction in "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Judge Bork denied access to all the alien plaintiffs (and to the American plaintiffs on other grounds) because he

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[7] Id. at 1127.

[8] 726 F.2d 774 (D.C. Cir.), cert. denied 467 U.S. 1251 (1984).

could not find an explicit grant of a cause of action in the statute. He felt that if the court were to decide the substantive issues at hand, it would be required to determine unsettled questions of international law (e.g., whether PLO-sponsored attacks on Israel are lawful) that are of a politically sensitive nature and are therefore best left to the executive branch. Thus, he sought a grant of an explicit cause of action in the statute that would justify such intervention by the court in foreign policy considerations, ultimately noting (i) that none of the relevant treaties gives individuals a right to judicial enforcement of treaty violations, (ii) that federal common law, though incorporating general principles of international law where appropriate, does not automatically grant individuals a right of action under international law and (iii) that the "law of nations" referred to in the 1789 statute must be construed in terms of the intent of the legislators who enacted it in 1789. On this last point, Judge Bork surmised that the substantive offenses in the law of nations to which the 1789 statute alludes include only violation of safe conduct, infringement of the rights of ambassadors and privacy:

> It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover.*

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*Id. at 813.

The conclusion that the 1789 statute did not provide for a private cause of action stands in direct contrast to the second circuit's decision in Filartiga v. Pena-Irala,[10] cited with approval by Judge Edwards in his separate concurring opinion in Tel-Oren. The Second Circuit court had held that the plaintiff Dolly Filartiga, a Paraguayan citizen, had a valid wrongful death claim under the 1789 statute against a former official of the Paraguayan government who had allegedly tortured her brother to death.[11]

However, Judge Bork's analysis in Tel-Oren went even further. He stated that he would not consider it appropriate for courts to hear the case even if, in his estimation, Congress had specifically granted them jurisdiction. As Judge Edwards pointed out, Judge Bork "would keep these cases out of court under any circumstances."[12]

In Persinger v. Iran,[13] Judge Bork declined to apply an exception to the Foreign Sovereign Immunities Act (the "FSIA") in a case brought by a former American hostage and his parents. The plaintiff son argued that the court had

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[10] 630 F.2d 876 (2d Cir. 1980).

[11] Judge Edwards believed that Filartiga did not apply in this case for two reasons. Filartiga involved official, state initiated torture whereas Tel-Oren involved the PLO which is not an officially recognized nation state. Secondly, Edwards argued torture is a violation of the law of nations while terrorism is not.

[12] Tel-Oren, 726 F.2d at 790 (Edwards, J., dissenting).

[13] 729 F.2d 835 (D.C. Cir.), cert denied, 469 U.S. 881 (1984).

jurisdiction under the FSIA in that the embassy grounds in Iran, where the tortious act had taken place, constituted United States territory as defined in the FSIA. Judge Bork concluded that Congressional intent was not to revoke foreign sovereign immunity for tortious acts committed in embassies abroad. This conclusion required the surprising proposition that U.S. embassies abroad are not subject to the jurisdiction of the United States.

However, the plaintiff parents, whose alleged injury occurred within the United States, clearly satisfied the literal definition of "United States territory," necessary for the court to have jurisdiction. Bork concluded that they too must not have a claim because it would have been anomalous if Congress had "intended to deny a remedy to [the son] -- a hostage imprisoned and physically abused for more than a year -- and yet also intended to expose Iran to suit by his parents for their emotional distress."[14] Judge Edwards, in his dissent, saw no such anomaly and would have upheld jurisdiction with respect to the parents' claim.

III. First Amendment Rights in Conflict with Foreign Policy

In Abourezk v. Reagan[15] the Secretary of State had refused to issue visas to four foreign individuals (Tomas Borge, the Interior Minister of Nicaragua; Nino Casti, a peace

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[14] Id. at 842-43.

[15] 785 F.2d 1043 (D.C. Cir.), cert. granted 107 S. Ct. 666 (1986). This case is also discussed in the Freedom of Speech section, supra at 8-9.

activist and a former member of the Italian Senate; and Olga Finlay and Leonor Rodriguez Lezcano, members of the Federation of Cuban
Women and experts on the status of women in Cuba) who had been invited to speak by three different organizations in the United States. The plaintiffs were members of the United States organizations. At issue were two provisions of the Immigration and Nationality Act (the "Immigration Act") that allow the Secretary of State to exclude aliens who are members of communist or anarchist organizations or who "seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Also at issue was the McGovern Amendment, which calls upon the Secretary of State to recommend admission for an alien who is excludable by reason of membership in a proscribed organization but who is otherwise admissible under the Immigration Act.

Judge Bork wrote a dissenting opinion in which he argued that the court should uphold the Secretary of State's exclusion of these four individuals because their mere "presence" and "entry" (not their alleged "activities", as the majority argued was required by the language of the statute) would be inimical to the interests of the United States. In addition, Judge Bork found the majority's argument that the Secretary of State had violated the McGovern Amendment to be faulty; membership in a communist organization, Bork

argued, is wholly distinct from affiliation with an adversarial foreign government. It is only the former, Judge Bork believed, that is subject to the McGovern Amendment, and the Secretary of State is therefore justified in excluding aliens who are affiliated with unfriendly foreign governments.

Judge Bork then went on to consider the constitutional issues in Abourezk. He argued that the appellants' first amendment rights to engage in political discourse with the four aliens were not abridged because:

> [t]he government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments.[16]

This opinion is an example of how Judge Bork allows the principle of deference to the executive to overrule judicial protection of individual rights.

Likewise, in Finzer v. Barry,[17] Judge Bork wrote a majority opinion holding that foreign policy interests, as defined by Congress in this case, must prevail even though they involve the suppression of speech. The plaintiffs in Finzer had challenged their arrests for demonstrating within the prohibited radius of the Nicaraguan and Soviet embassies as a violation of their First Amendment rights.

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[16] Id. at 1075.

[17] 798 F.2d 1450 (D.C. Cir. 1986). This case is discussed more fully in the First Amendment section, supra at 4-6.

Bork argued that the Law of Nations demands respect for the dignity and peace of foreign embassies. Judge Wald, dissenting, felt that the foreign policy interests could have been served without sacrificing First Amendment rights. She wrote:

> While the Law of Nations does impose some obligation to protect the dignity of foreign embassies, that obligation is flexible and does not require protection from all insult, especially at the expense of constitutional guarantees.[16]

Not only do the Abourezk and Finzer cases demonstrate a failure to give First Amendment rights due consideration when balanced against other interests, they also indicate that Judge Bork tends to characterize what is primarily a domestic issue as a foreign policy issue when doing so allows him to defer to the legislative and executive branches of government on separation of powers grounds.

IV. Other Cases

In Haitian Refugee Center v. Gracey,[17] a case involving immigration policy, Judge Bork expounded at length on the issue of standing in upholding the district court's dismissal of a claim for declaratory and injunctive relief by a refugee services organization. The Coast Guard's interdiction of Haitians on the high seas, the plaintiff refugee center had argued, violated the rights of interdicted Haitians under the Refugee Act of 1980, under the due process standards

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[16] Id. at 1485.

[17] 809 F.2d 909 (1987).

articulated in the Immigration Act and under the United Nations Protocol Relating to the Status of Refugees. Without touching on the merits of the case, Judge Bork found the refugee center to lack standing, a conclusion strongly refuted by Judge Edwards in his dissent.

In Ramirez de Arellano v. Weinberger,[20] Judge Bork joined a dissenting opinion by Judge Scalia which argued that an American citizen owning a ranch in Honduras, whose property had been used for U.S. military training of Salvadoran soldiers, could not sue the U.S. Government for compensation. The dissent maintained that separation of powers principles precluded jurisdiction because it would involve interference with the executive's conduct of foreign policy. The dissent also went to great lengths to argue that the plaintiff did not have standing, to which the majority responded by saying:

> This proposition [that the plaintiffs do not have standing] embodies a most extreme form of fanciful thinking. It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest. The suggestion that a United States citizen who is the sole beneficial owner of viable business operations does not have constitutional rights against United States government officials' threatened complete destruction of corporate assets is preposterous. If adopted by this court, the proposition would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery

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[20] 745 F.2d 1500 (D.C. Cir. 1984).

of decades of United States policy on transnational investments.[21]

The dissenting opinion demonstrates the extreme position Judge Bork is willing to endorse in order to use standing to dismiss a challenge to executive authority in the area of foreign affairs.[22]

CONCLUSION

While in some of these cases, (e.g. Tel-Oren, Persinger, Haitian Refugee Center, Crockett, and Convers,) the more liberal judges reached the same result that Judge Bork reached, in all of them except Convers, Judge Bork's colleagues got beyond the issue of jurisdiction. This is significant because, a decision on the merits leaves open the possibility that a different case raising similar issues may be decided differently in the future. In contrast, a holding that the court does not have jurisdiction over the case in the first place means that no such cases can be heard in the future.

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[21] Id. at 1515-16.

[22] Judge Bork revisited this case in Ramirez de Arellano v. Weinberger, 788 F.2d 762 (1986), after the Supreme Court had remanded the case for reconsideration in light of the Foreign Assistance and Related Programs Appropriations Act ("FARPAA"), which required the United States to reach agreement with the Honduran government as to the operation of training facilities of the type in dispute in this case. On remand, Judge Bork joined in a per curiam opinion dismissing the suit on the narrow ground that after failing to reach agreement with the Honduran government in compliance with FARPAA, the United States had ceased all operations on the plaintiff's land.

Judge Bork, more so than his colleagues on the court, believes that disputes pertaining to foreign policy do not belong in the courts, even if they involve violations of domestic statutory or constitutional law.

SEPARATION OF POWERS

Introduction

The Constitution does not explicitly state that the three branches of government are meant to function largely separate from one another. However, it has long been accepted that the structure of government established by the Constitution, including a system of checks and balances among the three branches, implies that the President, Congress, and the courts are to operate independently and coequally, with no branch usurping the power of another. In articulating the separation of powers principle, the Supreme Court has stated:

> All litigants and all of the courts which have addressed themselves to the matter start on common ground in recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another...Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of government....While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[1]

In contrast, Judge Bork's analysis of government powers starts with the premise that even though the Constitution established a tripartite government, the judiciary is inferior to the other two branches. In Bork's opinion, the Framers of the Constitution considered the judiciary to be "relatively

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[1] Buckley v. Valeo, 424 U.S. 1, 120-22 (1976).

insignificant".[2] He believes that the judiciary exceeds its properly limited role time and time again by resolving issues that are more properly left to the legislature or the executive. Theoretically, the powers of the legislative and executive branches increase equally when the judiciary is weakened, but as a practical matter Bork's rulings lead to the sovereignty of the executive since his holdings generally favor the executive branch over the legislature.

I. The Proper Judicial Role in Disputes Between Congress and the President

When two branches of government disagree over the proper scope of their respective powers, whether at the local, state, or federal levels, it has been common practice to look to the courts to resolve the issue. Chief Justice John Marshall justified this role for the judiciary in his famous Marbury v. Madison[3] opinion, stating: "It is emphatically the province and duty of the judicial department to say what the law is." Judge Bork, however, has maintained that the judiciary should not resolve disputes within a coordinate branch, or between Congress and the President. In three major cases raising separation of powers issues, he has argued that Congressmen do not have standing to litigate claims that their rightful powers are being abridged. Each

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[2]Bork, "Judicial Review and Democracy", Society, November/December 1986, at 5.

[3]5 U.S. (1 Cranch) 137 (1803).

time he was the only Judge to hold that view. By denying Congressional plaintiffs standing to sue, Judge Bork would prohibit the judiciary from carrying out its proper role of interpreting the laws.

In Barnes v. Kline,[*] thirty-three Congressmen challenged President Reagan's use of the pocket veto to defeat a bill placing certain human rights conditions on the continuance of military aid to El Salvador. They believed that the President had improperly used the pocket veto because, although Congress had adjourned between sessions, the Clerk of the House and Secretary of the Senate were authorized to receive messages from the President. The Court of Appeals agreed and ordered that the bill become law. On appeal to the Supreme Court, Chief Justice Rehnquist delivered the opinion for the majority, holding that the case was moot because the term of the bill had expired. The majority did not address the question of Congressional standing. Justices Stevens and White, dissenting, believed that Congress has standing to ensure "that its enactments are given their proper legal effect."[=]

Judge Bork's dissent in Barnes was a thirty-page attack on the concept of Congressional standing. Bork stated that allowing Congress to seek judicial resolution of this dispute or any other between the legislative and executive branches was so dangerous

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[*] 759 F.2d 21 (1985), vacated sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987).

[=] 107 S. Ct. at 737 (Stevens & White, JJ., dissenting).

it jeopardizes basic liberties and revolutionizes our government. He wrote:

> [W]hen federal courts approach the brink of 'general supervision of the operations of government', as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties....This case represents a drastic rearrangement of constitutional structures, one that results in an enormous and uncontrollable expansion of judicial power.[6]

In Bork's estimation, "the task of umpiring disputes between the coordinate branches" is not suited to the judiciary and will raise "dangers of repeated and head-on confrontations" with those branches.[7] Bork would "renounce outright the whole notion of congressional standing,"[8] on the grounds that congressional plaintiffs are not alleging personal injury done to them. He has concluded that "when the interest sought to be asserted is one of governmental power, there can be no congressional standing."[9] Bork, however, does not indicate when, if ever, a member of Congress can bring an action against the executive branch. Presumably, the right would be extremely limited since Bork believes that the judiciary should not become involved in any disputes between Congress and the President.[10] The theoretical possibility of political (i.e., legislative) redress

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[6] Barnes, 759 F.2d at 71, (Bork, J., dissenting).

[7] Barnes, 759 F.2d at 58 (Bork, J., dissenting).

[8] Id., 759 F.2d at 41 (Bork, J., dissenting).

[9] Barnes, 759 F.2d at 68 n.18 (Bork,J., dissenting).

[10] See Barnes, 759 F.2d at 55 (Bork, J., dissenting).

appears to bar standing[11].

Yet the majority in Barnes pointed out that courts may not avoid resolving justiciable controversies simply because one or more branches of the government are involved in the case. Quoting Justice Rehnquist on the need for the judiciary to confront the other co-equal branches of the Federal Government when necessary, the majority stated that: "Supreme Court precedent contradicts the dissent's sweeping view that Article III bars any governmental plaintiff from litigating a claim of infringement of lawful function."[12] The majority concluded that "a dispute between Congress and the President is ready for judicial review when 'each branch has taken action asserting its constitutional authority -- when, in short, 'the political branches reach a constitutional impasse."[13]

Judge Bork's position in Barnes is internally inconsistent as well as contrary to Supreme Court precedent. He wishes to avoid what he sees as judicial usurpation of the legislative and executive functions. Giving congressmen standing to sue, he believes, will "enhance the power and prestige of the federal judiciary" at the expense of the other branches of government."[14] Yet the result of Bork's position would have been to allow the

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[11] Id., 759 F.2d at 55, 70 (Bork, J., dissenting).

[12] Barnes, 759 F.2d at 27.

[13] Barnes, 759 F.2d at 28, quoting Goldwater v. Carter 444 U.S. 996, 997 (Powell, concurring) (1985).

[14] Barnes, 759 F.2d at 42 (Bork, J., dissenting).

President to circumvent congressional overrule of his veto; an enhancement of executive power at the expense of Congress. This would be a shift of power because, as the majority pointed out, President's Ford and Carter both refrained from using the pocket veto during intersession adjournments.[15]

Bork's position regarding standing in disputes between the two other branches is one area in which his opinions have changed during his time on the bench. Since he first considered the issue of standing, two trends have been noticeable: (1) the imposition of ever higher hurdles before he would grant standing, and (2) a conclusion in each case that standing should not be granted.

In an earlier decision, Vander Jagt v. O'Neill,[16] Bork argued that legislators had standing only if they alleged a complete nullification of their influence. In his analysis, diminution of influence was insufficient to confer standing because if legislators had standing whenever there was a diminution, courts' task "would be extraordinarily intrusive, involving frequent, 'repeated and essentially head-on confrontations' between Congress and the federal courts."[17]

With this standard, the occasion for judicial intervention would be few and limited. There were various inconsistencies

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[15] Barnes, 759 F.2d at 37 & n.32.

[16] 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983).

[17] Vander Jagt, 699 F.2d at 1181 (Bork, J., concurring).

in this position. First there is no bright line between diminution and nullification: depending upon how a claim was analyzed, a court might find that a vote had been diminished or nullified. In addition, Bork argued that the judiciary's granting standing to legislators displayed a lack of respect and led judges into areas where they were incompetent; if this rationale were valid, the court should not grant standing even if there were a complete nullification. The fact that the courts would intrude less frequently would not make them any more competent.

However, in Barnes, Bork rejected his earlier view and concluded that neither diminution nor nullification is an adequate basis for standing.[18] Instead, he now believes that assertions of Congressional power are insufficient to find congressional standing.

The majority in Vander Jagt held that the congressional plaintiffs had standing to sue but that the court in this instance should exercise its discretion to withhold equitable and declaratory relief because it is essentially a political question. In his concurring opinion, Judge Bork argued that the separation of powers issues which led the majority to refrain from deciding the case should be considered as part of the standing requirement.[19] If both the majority and Judge Bork reach the same outcome, why does it matter that the case is

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[18] Barnes, 759 F.2d at 68 n. 18 (Bork, dissenting).

[19] Vander Jagt, 699 F.2d at 1197, (Bork, J., dissenting).

resolved under the political question doctrine rather than by denying plaintiff's standing to sue? The majority directly answered this question by pointing out that to deny standing and thus deny that the court has jurisdiction over the case would make it impossible for the court to exercise its discretion in the future, should judicial resolution of such a conflict be required. The majority wrote:

> Thus while there are compelling prudential reasons why we should not interfere in the House's distribution of Committee seats, it is nevertheless critical that we do not deny our jurisdiction over the claims in this case. As long as it is conceivable that the Committee system could be manipulated beyond reason, we should not abandon our constitutional obligation - our duty and not simply our province - 'to say what the law is'.[20]

Crockett v. Reagan,[21] involving a conflict between Congress and the executive over the proper application of the War Powers Resolution, is another instance where the majority held that they had jurisdiction over the case, but declined to rule because the case presented a non-justiciable political question. Judge Bork wrote a concurring opinion arguing that the court had no jurisdiction because the congressional plaintiffs lack standing.

Thus, Bork's positions that congressional plaintiffs have no standing, and that separation of powers concerns should be addressed as part of the standing requirement are

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[20] Vander Jagt, 699 F.2d at 1170, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[21] 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

extreme ones, as no other judge on the D.C. Circuit has agreed with him in these cases. More importantly, if accepted, the scope of judicial power in resolving conflicts among the legislative and executive branches of government would be severely restricted.

Bork has invariably concluded that Congress lacked standing to maintain an action against the executive branch ever since he first gave any consideration to the separation of power issue. If one ignores American Federation of Gov. Employees v. Pierce,[22] a per curiam decision which Bork himself dismisses, saying:

> I overlooked the latent separation-of-powers issues in that case, which was my first encounter with this court's congressional standing doctrine, and in which, because of the emergency nature of the appeal, the opinion was released one day after oral argument,[23]

then in separation of power actions brought by legislators, he has always ruled in favor of the executive branch and against legislators.

II. Deference to the Executive

Judge Bork has written several opinions which justify judicial deference to executive power based on the separation of powers argument. In Nathan v. Smith,[24] a case involving the Ethics in Government Act, Bork observed that the President is

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[22] 697 F.2d 303 (D.C. Cir. 1982).

[23] Barnes, 759 F.2d 45 n. 2 (Bork, J., dissenting).

[24] 737 F.2d 1067 (D.C. Cir. 1984). This case is also discussed in the Special Prosecutor section, supra at 91-92.

to execute the laws, and has the executive authority to decide whether to prosecute a case. Bork interprets this power to include all steps in the prosecutorial process including the preliminary investigation.[23] As a result, a court may not order the Attorney General to prosecute a case. In addition, in Bork's view, an act of Congress that would remove any prosecutorial discretion from the Executive branch would raise separation of powers questions, implying that the Ethics in Government Act is unconstitutional because it authorizes the court to appoint independent counsel. Bork appeared to expand executive power at the expense of the legislature and judiciary since he was preempting the entire prosecutorial process, and not merely the decision whether or not to prosecute.

In the foreign affairs area, Judge Bork has argued in favor of near complete deference to the executive and believes that the War Powers Resolution is unconstitutional because it violates separations of powers principles.[24] He has argued for a broad interpretation of executive privilege in Freedom of Information Act cases, and has generally ruled in favor of government agencies in FOIA cases despite the fact that Congress directed the courts to give federal agencies no deference in interpreting

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[23] Judge Bork cited no precedents to support his inference that executive power to decide whether to prosecute implies exclusive executive control over all steps in the prosecutorial process, including the preliminary investigation. Nathan, 737 F.2d at 1078-79, (Bork, J., concurring).

[24] See supra at 95.

and applying the Act.[27] In short, Judge Bork has used the separation of powers principle to justify largely unchecked power in the executive branch in a number of areas.

III. Deference to Congress

In two areas, Judge Bork has maintained that judicial restraint required deference to Congress, against the claims of individuals seeking to vindicate constitutional rights. In Bartlett ex rel Neumann v. Bowen,[28] he argued that sovereign immunity bars a constitutional challenge to social security laws, prompting the majority to respond that:

> The delicate balance implicit in the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, but also to judge the constitutionality of its own actions....It makes absolutely no sense to us, under any meaningful system of separation of powers, to allow the legislature branch to pass.... a law then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law.[29]

It would be a grave abuse of the concepts of separation of powers and sovereign immunity to utilize them to so weaken the judiciary that it could not fulfill its principal purpose, the review of the constitutionality of government actions. Bork's notion of a

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[27] See Wolfe v. Department of Health and Human Services, 815 F.2d 1527, vacated and rehearing en banc granted, 821 F.2d 809 (D.C. Cir. 1987), discussed supra at 56-57.

[28] 816 F.2d 695 (D.C. Cir. 1987); discussed supra at 46-49.

[29] Bartlett, 816 F.2d at 707.

"relatively insignificant" judiciary is consonant with his notion of sovereign immunity: collectively, they would eviscerate the judiciary and wreak havoc on the constitutional balance of power.

Judge Bork extended his principle of judicial deference to Congress to the extreme when, in 1972, he argued that Congress could forbid courts to order bussing as a remedy in school desegregation suits.[30] In his view, which was not shared by any other scholar testifying at the hearings, Congress has general power over court-ordered remedies under section 5 of the Fourteenth Amendment. That section gives Congress the power to implement the equal protection clause, but says nothing about congressional interference with judicial processes. Even Bork's mentor and fellow conservative Alexander Bickel, testifying at the same hearings, concluded that such interference with the power of the court was unconstitutional and "recklessly radical in undertaking to alter the balance of power between the judiciary and the political institutions of the federal government."[31]

Conclusion

Bork's view of separation of powers and related concepts of judicial power suggest he would radically alter the allocation of powers between the three coordinate

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[30] See Equal Educational Opportunities Act, Hearings Before the House Comm. on Edu. and Labor, part 3, 92nd Cong., 2d Sess., July 31, 1972 at 1507.

[31] Id. at 1661.

branches. He would remove power from the judiciary and grant it to the other branches, especially the executive branch, which has in practice been the principal beneficiary of his philosophy of judicial abstinence. He would not permit the judiciary to mediate in disputes between the executive and legislative branches, and he would permit sovereign immunity to eliminate the court's ability to review the constitutionality of congressional actions.

ACCESS TO COURTS

Introduction

Judge Bork's decisions demonstrate his propensity to curb access to the courts, in order to limit the role of the judiciary and to "leave the resolution of a variety of problems to other institutions, both public and private."[1] He views the denial of access to courts as a method of curbing judicial power: "To make judicially cognizable all injuries that persons actually feel and can articulate would widen immeasurably, perhaps illimitably, the authority of the federal courts to govern the life of the society."[2] However, Judge Bork's opinion of the proper role of the judiciary in society is not a legally sufficient reason to dismiss the claims of plaintiffs who desire judicial resolution of their disputes. Rather than adhere to established doctrines that determine when a court has jurisdiction over a claim, Judge Bork has altered those doctrines in an attempt to implement his vision of a limited judiciary.

The concept of standing, which specifies when a plaintiff has the right to file suit, is most often used by Judge Bork to dismiss cases without a hearing on the merits of the

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[1] Vander Jagt v. O'Neill, 699 F.2d 1166, 1178 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 91 (1983) (in a concurring opinion, Judge Bork argued that members of Congress have no standing to bring an action against the House leadership, challenging rules limiting the number of partisan seats to congressional committees).

[2] Id.

claim. A plaintiff has standing to sue only if there is an actual dispute between the parties, rather than a theoretical one; and if the plaintiff can demonstrate that he stands to lose or gain some tangible benefit through resolution of the case. The Supreme Court addresses standing issues by asking two questions: 1) does the plaintiff allege injury in fact, economic or otherwise; and 2) does the plaintiff seek to protect an interest arguably protected or regulated by the statute or constitutional provision in question.[3]

Judge Bork has made standing rules more restrictive by holding that plaintiffs do not having standing when their claim violates separation of powers principles, or sovereign immunity; and by denying that injury to non-economic interests is sufficient to demonstrate a stake in the outcome. However, a notable exception to this is Bork's opinion in Dronenburg v. Zech,[4] which acknowledged but did not discuss the sovereign immunity issues involved. Plaintiffs have also been denied access to the courts by Judge Bork's rulings on procedural matters, ripeness issues, and indirectly through the denial of attorney's fees.

I. Standing

When a group of American citizens wished to challenge President Reagan's program of interdicting ships to prevent illegal aliens from entering the United States, Judge Bork

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[3] See L. Tribe, Constitutional Law 80 (1978).

[4] 741 F.2d 1388 (D.C. Cir. 1984).

concluded that under the doctrine of separation of powers, the groups had no standing to bring the case.[5] Judge Edwards, dissenting in the case, sharply criticized Judge Bork for disregarding Supreme Court precedent on the question of standing. He wrote:

> The majority seeks to abandon the Supreme Court's consistently articulated test of causation in favor of an entirely new test applicable only to cases such as this one...This is a quite extraordinary notion of "causation" both in the novelty of the majority's test and in its disregard of Supreme Court precedent....this novel view of standing cannot be adopted as the law, especially given the Supreme Court's clear and consistent articulation of a different test of causation.[6]

In United Presbyterian Church v. Reagan,[7] Judge Bork joined in an opinion written by Judge Scalia holding that a member of Congress, religious and political organizations, journalists, academics, and politically active individuals were precluded from bringing an action challenging the constitutionality of an executive order involving governmental and military intelligence gathering operations. The court held that the plaintiffs failed to allege "redressable concrete injury" and found they had no standing to challenge the executive order. Moreover, the court affirmed the district court's decision denying the plaintiffs' requests for discovery on the injury issue on the ground that the plaintiffs failed to allege

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[5] Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987).

[6] Id., (Edwards, J., dissenting).

[7] 738 F.2d 1375 (D.C. Cir. 1984).

specific facts sufficient to confer standing.

In Bellotti v. U.S. Nuclear Regulatory Commission,[9] Judge Bork, writing for the majority, severely curtailed the ability of the public to intervene in nuclear license amendment proceedings under the Atomic Energy Act. He held that the Attorney General for the State of Massachusetts had no standing to intervene on behalf of the people of Massachusetts in a Nuclear Regulatory Commission ("NRC") enforcement proceeding that involved the license amendment of the nuclear power station. The proceeding had been developed and ordered by the NRC's Office of Inspection and Enforcement in response to severe safety problems uncovered at the station. Judge Bork wrote that the intervention of the Attorney General would "expand many proceedings into virtually interminable, free-ranging investigations."[9]

Similarly, in Von Aulock v. Smith,[10] Judge Bork circumscribed the ability of individual employees to seek judicial review of an Equal Employment Opportunities Commission ("EEOC") bulletin, which the employees claimed authorized their employers to maintain pension plans that discriminated on the basis of age and race. In dismissing their claims alleging unconstitutional discrimination based on age and racial discrimination, Judge Bork held that the employees lacked

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[9] 725 F.2d 1380 (D.C. Cir. 1983).

[9] 725 F.2d at 1381.

[10] 720 F.2d 176 (D.C. Cir. 1983).

standing to challenge the EEOC bulletin because their injury was not "fairly traceable" to the bulletin itself.

While the concept of standing is complex and particular to each statute and factual situation, an overall review of Judge Bork's decisions indicates an unwillingness to recognize the court's jurisdiction in cases in which individuals are asserting private claims against administrative and executive conduct. In certain cases, Judge Bork's application of standing requirements appears to be politically motivated. In Morris v. Washington Metropolitan Area Transit Authority,[11] for example, Judge Bork held that the Washington Metropolitan Area Transit Authority was immune from the suit of a discharged transit police officer who claimed racial discrimination resulted in his termination. In his view, Congress, as well as the states of Virginia and Maryland, had conferred sovereign immunity upon the Transit Authority, thus precluding any claims by the individual. Judge Bork distinguished two Supreme Court decisions in apparent contradiction with his ruling, in which immunity was not found to exist in actions against a school board or against a regional planning agency.

In contrast, in Dronenburg v. Zech,[12] Judge Bork held that sovereign immunity was not present in a suit attempting to enjoin the United States Navy's discharge of the plaintiff on the basis of his homosexuality. This is inconsistent with

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[11] 781 F.2d 218 (D.C. Cir. 1986).

[12] 741 F.2d 1388 (D.C. Cir. 1984).

Bork's usual propensity to circumscribe judicial review by using standing arguments. Bork's failure to dispose of the case on sovereign immunity grounds is especially striking in light of his acknowledgement at the opening of his opinion that "there has been some disagreement on the question whether [the applicable federal statute] waives sovereign immunity."[13] Despite the admittedly open question of standing, Judge Bork permitted judicial review on the merits in order to reach the constitutional issues and ultimately to endorse his long-standing view that there is no constitutionally protected right to privacy.

II. A Private Cause of Action Under Federal Statutes

In some cases, Judge Bork limits the ability of individuals to enforce and benefit from various statutes by denying them a right of action absent an express legislative provision. In Tel-Oren v. Libyan Arab Republic,[14] for example, Judge Bork denied standing to individual Israeli survivors of a terrorist attack on a bus in Israel. The Israeli citizens brought suit against Libya, the Palestine Liberation Organization and others, alleging claims under various treaties and international law. In a concurring opinion, Judge Bork dismissed their claims, finding no private right of action under federal common law, federal statutes, the treaties

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[13] Id. at 1391 n.3.

[14] 726 F.2d 774, 798 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

cited, or international law. Judge Bork noted that any determination of these issues by the federal courts would necessarily constitute an encroachment by the judiciary upon the authority of the executive branch to conduct foreign relations. Judge Bork refused to recognize a private right of action absent an express grant from the legislature.[15]

In Nathan v. Smith,[16] Judge Bork, in a concurring opinion, held that private individuals had no standing to bring an action under the Ethics in Government Act to compel the U.S. Attorney General to undertake a preliminary investigation into an incident involving the Ku Klux Klan and the American Nazi Party. Plaintiffs alleged that several persons were killed by members of the Ku Klux Klan and the American Nazi Party in Greensboro, North Carolina. Judge Bork's concurrence advocated dismissal of the claims on the grounds that Congress did not confer standing upon private citizens under the Ethics in Government Act. Moreover, Judge Bork held that any provision for such actions by private citizens would have violated the separation of powers doctrine, because federal prosecutions are to be exclusively under the control of the executive branch.

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[15] See also Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984), cert. denied, 469 U.S. 881 (1985) (involving claims by one of the American hostages held captive in the American Embassy in Iran and his parents). In Persinger, Judge Bork noted that Congress did not intend to give the federal courts jurisdiction over actions against foreign states for torts committed on American Embassy grounds.

[16] 737 F.2d 1069, 1077 (D.C. Cir. 1984).

III. Procedural Requirements

Judge Bork's practice of using procedural roadblocks to prevent an individual from asserting a claim was overruled by the en banc panel in Brown v. United States,[17] an action by inmates challenging prison conditions. The Brown majority overruled Judge Bork's earlier majority opinion in McClam v. Barry.[18] In McClam, Judge Bork had ruled that a local six-month notice of claim provision for suits against the District of Columbia applied also to federal claims for damages against the District. This resulted in the plaintiff's constitutional claims against District of Columbia police officers being dismissed without a hearing on the merits.

The requirement that an individual serve notice on the District of Columbia within six months after an incident occurs or forfeit his constitutional claims for damages is a severe limitation on the ability of individuals, many of whom proceed pro se, to pursue such claims. The Brown court disagreed with Judge Bork's conclusion in McClam that the legislative history showed that Congress intended that the notice of claim provision apply to federal causes of action and that the balancing of interests between the individual and the District of Columbia required application of the Notice of Claim provision. Contrary to Judge Bork's conclusion, the Brown majority ruled that the notice of claim provision was not applicable and noted that

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[17] 742 F.2d 1498, 1500-01 (D.C. Cir. 1983).

[18] 697 F.2d 366 (D.C. Cir. 1983).

the overwhelming majority of state and federal courts addressing the issue had also refused to borrow and apply the notice of claim provision.

IV. Ripeness

Judge Bork has also participated in decisions which use ripeness issues to preclude individuals and public interest groups from challenging administrative rules and presidential directives. In National Latino Media Coalition v. Federal Communications Commission,[19] Judge Bork, writing for the majority, held that several groups representing the viewing and listening public were precluded from challenging action taken by the Federal Communications Commission concerning the use of a lottery to award licenses between equally qualified applicants in tie-breaker situations. In 1982, Congress had amended the Communications Act of 1934 to provide for a lottery, so long as the lottery was administered so as "to grant 'significant preferences' to minority owners and other applicants likely to enhance diversity of viewpoints."[20] Judge Bork's decision held that the FCC's statements amounted to an "interpretative rule" with limited effect that did not require notice-and-comment provisions under the statute. Because the FCC did not bind itself to the use of the lottery in tie-breaking situations by promulgating an "interpretative rule," Judge Bork held the issue was not ripe for determination.

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[19] 816 F.2d 785 (D.C. Cir. 1987).

[20] Id. at 787.

Judge Bork's decision precluded any judicial consideration of arguments by the petitioners that the pronouncements concerning the use of a lottery in tie-breaking situations without regard to minority representation might "encourage administrative law judges to be lax in making rigorous and detailed comparisons that are necessary to distinguish among rival applicants in a comparative hearing."[21]

V. Attorney's Fees

Congress has determined that certain cases which should be brought to court will not be pursued unless a plaintiff who wins such a case can recover attorneys' fees from the defendant. Important constitutional and statutory rights cannot be vindicated by those without the financial resources to pay for litigation. Thus, federal legislation provides for the recovery of attorneys' fees by prevailing plaintiffs in a number of areas, including civil rights and environmental cases. In the opinions which Judge Bork has written concerning attorneys fees,[22] he has consistently made it difficult for plaintiffs to collect such fees, thereby discouraging future plaintiffs from pursuing their claims.

Conclusion

Judge Bork has himself noted that "[t]he standing requirement, at bottom, has to do with what kinds of interest

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[21] Id. at 798.

[22] These are primarily in cases under the Freedom of Information Act and in the area of environmental law. See supra pages 62-63 and 73-74.

courts will undertake to protect."[23] As the cases above indicate, Judge Bork has not hesitated to use the standing and ripeness requirements to preclude individuals from procuring judicial resolution of their individual claims. As the Dronenburg case demonstrates, however, Judge Bork has also not hesitated to deviate from his application of strict standing rules to render a substantive determination which abrogates an individual's substantive rights directly.

[23] Barnes v. Kline, 759 F.2d 21, 43 (D.C. Cir. 1985).

THE OPPOSITION TO BORK:

The Case For Women's Liberty

National
Abortion Rights
Action League

OPPOSITION TO BORK:

The Case For Women's Liberty

The NARAL Legal & Research Department wishes to thank Marion B. Stillson and Doreena P. Wong, 1987-88 Graduate Fellows in the Georgetown University Law Center Women's Law Public Policy Program, whose invaluable participation was made possible by the Charles H. Revson Foundation. NARAL also gratefully acknowledges the assistance of Rachel Gold and Terry Sollom of the Alan Guttmacher Institute, Diana Traub of the ACLU Reproductive Freedom Project, Marielena Fena, Lisa Klein, William Sautter and Fritz Wiecking. NARAL, however, bears full responsibility for the statements made and the views expressed in this report.

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NARAL

EXECUTIVE SUMMARY

Justice Powell's resignation from the Supreme Court left the Court divided regarding the constitutionality of state laws limiting abortion. If the vacancy is filled by Judge Robert Bork, the majority of the Court will no longer uphold women's right to make this personal decision without state interference. Judge Bork believes that Roe v. Wade, the landmark abortion case, was incorrectly decided. Contrary to his praise of "judicial restraint," he is a judicial radical who asserts that justices should readily reconsider constitutional cases they believe to have been wrongly decided. It appears clear that he would not be reluctant to overturn or erode Roe. Erosion would be just as damaging as overturning Roe: either way, the health and well-being of millions of Americans would be adversely affected.

If federal constitutional protection were to be nullified, women could not be secure that state legislatures would respect their reproductive privacy. The states have proven unresponsive on the issue of abortion rights, despite the fact that the vast majority of Americans consistently supports women's privacy. NARAL's study of state abortion laws indicates that if Roe succumbs, physicians in many states will face criminal abortion statutes with renewed enforceability. Litigation will be necessary in most jurisdictions; in at least half of the states, access to legal abortion will be uncertain. In addition, new restrictive legislation is very likely to be enacted; states will vary substantially in the end, as they did prior to 1973, with many women again suffering the health hazards and cost of interstate travel, and septic abortions. Maps in Appendix 1 illustrate our findings.

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Prior, at least, to his confirmation hearings, Judge Bork made no secret of his opinion of Roe. He called it a "wholly unjustifiable judicial usurpation of State legislative authority." To prevent such 'usurpation,' he would bind present-day judges strictly to the Founders' "original intent," claiming that privacy, the source of the abortion right in Roe, was not originally intended. Judge Bork's arguments notwithstanding, abortion was in fact a common law right until the nineteenth century. Furthermore, not only is privacy implicated in many of the enumerated rights, but the Ninth Amendment reserves to the people all unspecified rights.

Robert Bork bolsters his reactionary position by exalting the majoritarian process used by state legislatures. He minimizes the counterbalancing need to respect and guarantee the minorities' liberty of conscience, although this theme inspired the founding of our nation. Moreover, true judicial conservatives honor precedent except in rare cases where they see no justifiable alternative. Judge Bork on the other hand appears to have few reservations about reversing entire bodies of constitutional law should their reasoning follow a course that fails to please him. He has recanted controversial views when it has been convenient to do so. In the recent Senate hearings he significantly adjusted certain of his positions. In sum, he is not a neutral academic, but a dangerous reactionary.

For women in our society, reproductive self-determination is an essential guarantor of all other freedoms. The National Abortion Rights Action League opposes the confirmation of Judge Robert Bork because he has shown that he would not guarantee female citizens this fundamental right.

***

A. INTRODUCTION

In the thirty-three years since Brown v. Board of Education, a generation has been raised with the inspiration of a Supreme Court devoted to principles of racial equality and respect for individual integrity. And due to the vast improvements in women's legal status, many of us rightfully expect that our government will be rational, fair, and accountable -- that irrespective of our status as female citizens, we will be treated with respect.

The 1973 Roe v. Wade decision was one of the most significant and symbolic of these improvements.[1] (See Appendix 5) In Roe, the Supreme Court stated clearly that women's interest in privacy and personal liberty is constitutionally protected and that states may not abridge the traditional common law right to terminate an unwanted pregnancy without violating women's fundamental rights. In the fourteen years since then, in nearly two dozen cases, the Court has systematically reaffirmed that "few decisions are more personal and intimate, more properly private" than those concerning reproduction.[2]

Regaining the legal authority to make conscientious decisions about childbearing, without fear and without degradation, radically altered the lives of American women. But, our future as a nation devoted to the principle of respect for individual integrity is no longer clear; and for women this is particularly frightening.

The June 26, 1987 resignation of Justice Lewis F. Powell, Jr. left the Supreme Court divided regarding the constitutionality of state laws prohibiting abortion. In the years since Roe, and despite increased popular acceptance of women's rights, many hostile and intransigent state legislatures have continued to deny that their female citizens ought to have the right to control their fertility. The nomination of Robert Bork -- who was chosen in part for his

extreme deference to legislative and executive authority, and in part for his outspoken criticism of Roe v. Wade -- should be alarming to those concerned with the health and legal status of women in America.

In this report, the National Abortion Rights Action League (NARAL) -- the political arm of the reproductive rights movement with over 250,000 active members -- documents why it finds Robert Bork an unacceptable candidate for the United States Supreme Court. His rejection of what he calls "judicial activism" amounts to an abdication of judicial responsibility to protect individual rights. Despite the claims of his supporters, when Robert Bork condemns what he calls an "imperial judiciary" and lauds the "original intent" of our Founders, he is not in fact engaging in neutral analysis. A neutral judicial posture involves making an honest effort to uphold the original concepts -- such as civic equality, access to the judicial system, and personal liberty -- that inspired the drafters of the Constitution.

In sharp contrast, instead of striving to remain faithful to these ideals, Judge Bork asserts that power should be constrained only as it would have been in the eighteenth century. When he urges that judicial understanding of human relationships must be grounded in "original intent," Robert Bork intends to bind twentieth century courts with eighteenth century assumptions about gender roles, race, and the prerogatives of the wealthy. With this nomination, the Reagan administration is attempting to unravel two hundred years of constitutional jurisprudence and to nullify the very mechanism that ensures "liberty and justice for all." If the Senate were to make a "justice" of a man who has been nominated in part because he denies that the constitutional principles of liberty and equality apply in full to female citizens, it would be doing a grave injustice to millions of American women.

B. THE SOUNDNESS AND SIGNIFICANCE OF ROE V. WADE

The 1973 Roe v. Wade decision was grounded on the already "fundamental" constitutional right to personal privacy, a right not explicitly enumerated in the Constitution. Consequently, many who wish to curtail women's right to choose abortion claim that the right to privacy was first concocted in that case. These claims ignore the extensive development of the right of privacy during the nearly one hundred years prior to Roe.

The United States Supreme Court first recognized an implicit right of personal privacy under the Constitution in 1891.[3] In the years that followed, the Supreme Court and the lower federal courts increasingly based decisions on the right to privacy. In a variety of contexts involving family integrity, the courts determined that recognition of this tacit right was required to make the First, Fourth, Fifth, Ninth and Fourteenth Amendments meaningful.[4] These decisions have invalidated, among others, state limits on the freedom to marry, and to have, raise, and educate one's children.[5]

Griswold v. Connecticut, decided in 1965, was the first Supreme Court case in the family rights area to turn specifically and solely on the "fundamental" constitutional right of privacy. The Court invalidated a Connecticut statute which since 1879 had criminalized both the use of contraceptives, even by married couples, and prescription of contraceptives by clinic physicians. Justice Douglas explained: "We deal with a right to privacy older that the Bill of Rights -- older than our political parties, older than our school system."[6]

The justices did not all agree, however, on the precise source of the implied right. Among them, they utilized three different constitutional theories. First, most of the justices based the right in the First, Third, Fourth, Fifth and Ninth Amendments, made applicable to the states by the

Fourteenth Amendment. Second, a smaller group of justices found a fundamental right of privacy which was protected by the due process clause of the Fourteenth Amendment directly, and by the open-ended Ninth Amendment. Third, one justice who joined the decision could not adopt the incorporation doctrine so he based his concurrence squarely on infringement of a fundamental right guaranteed directly by the due process clause of the Fourteenth Amendment. While some have criticized this lack of unanimity, many legal scholars see this diversity as a source of strength for the underlying right: "The lack of unital philosophy in the Supreme Court [in Griswold] may very well be a contributing factor to the success of our democracy."[7]

The same diversity of reasoning recurred in the cases that followed Griswold. For example, seven years later, when an unmarried person challenged the constitutionality of a nineteenth century Massachusetts statute forbidding the sale of contraceptives, the Court reasoned that the guarantees of equal protection and privacy were both offended. The same phenomenon recurs in Roe v. Wade; the anti-abortion laws were seen to violate personal privacy, the liberty secured by due process, and the Ninth Amendment.

Recognition of rights that are not explicitly mentioned in the Constitution is certainly far from unique to privacy jurisprudence. In 1868, for example, the Supreme Court determined that the right to travel freely between states was indicated by several textual provisions of the Constitution -- the Commerce Clause, the Tax Clause and the right to assemble peaceably -- as well as by basic common sense.[8] Similarly, the right to marry the person of one's choice without undue government regulation goes unmentioned in the Constitution,[9] as does what is now known as the First Amendment right to associate freely with others.[10] Yet, the Supreme Court has identified these rights as "fundamental" to our

concept of ordered liberty, based on their best understanding of constitutional text and history, and it would be hard to imagine life without them.

Furthermore, the Founders did not attempt in the Bill of Rights to delineate a complete and mutually exclusive list of limits on government power. To ensure that there would be no misunderstanding on this score, the Ninth Amendment states clearly: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The articulations of the right to privacy in both Griswold and Roe rely in part on the Ninth Amendment; in neither case, however, did the Court explain to what extent that amendment was dispositive.

In fact, the Court has still never fully explicated the role of the Ninth Amendment in the Roe line of cases. Yet, it seems obviously relevant that -- despite the assertions of its detractors -- the right to choose abortion is anything but a new phenomenon. When the Constitution was written, women in the United States enjoyed an extremely broad freedom to end unwanted pregnancies, as English women had for many centuries.[11] About the same time in both countries, in the latter half of the nineteenth century, statutes limiting the right were enacted. Modern scholars disagree about the precise intent of this legislation: some think the laws were designed to protect women from the surgeon's knife, often deadly in the days before antiseptic procedures; others believe the motivation was religious.[12] As there is limited legislative history, the issue has remained unsettled.

By the late 1960's, however, both of these factors had changed significantly. Medical progress had rendered abortion safe, and the women's movement, among other social phenomena, had encouraged a diversification of social mores. In addition, the mortality statistics correlated to septic

abortions had begun to alarm health care professionals; for resorting to illegal or self-induced abortion is not only a humiliating and emotionally damaging experience for women, it is also dangerous and often fatal. In 1962 nearly 1,600 women were admitted to Harlem Hospital Center, in New York City, for incomplete abortions; 701 women were admitted to the University of Southern California-Los Angeles County Medical Center with septic abortions. In 1965, 20% of pregnancy-related deaths nation-wide were due to illegal or self-induced abortion. Six years prior to the Roe v. Wade decision, in 1967, it is estimated that 829,000 illegal or self-induced abortions occurred nation-wide. (See Appendix 3) Thus it was that groups like NARAL (then the National Association for the Repeal of Abortion Laws) began to be formed by physicians and feminists to work for the repeal or reform of what had come to be seen as antiquated laws.

The statute challenged in Roe had since 1857 outlawed all abortions in Texas, with the sole exception of instances where continued pregnancy would threaten the woman's life.[13] Jane Roe (a pseudonym) told her physician she had become pregnant as a result of a horribly traumatic gang rape;[14] he explained that he was not able to offer her an abortion, despite the safety of the procedure, because her circumstances did not come within the narrow exception to the criminal statute.

Because citizens of good conscience can disagree about the morality of abortion, and in response to the mortality statistics, the Supreme Court held, in a 7-2 opinion, that the constitutional right to personal privacy is "broad enough to encompass a woman's right to terminate her pregnancy." Yet the right was not found to be an unqualified one. In order to balance personal privacy against the state's competing interest in public health and regulation of the practice of medicine, Justice Blackmun, for the Court, drew bright lines based on the three

medical stages of pregnancy. Because abortion is statistically safer than childbirth during the first three months of pregnancy (termed the first "trimester"), abortion restrictions during this period do not further states' interest in women's health; thus, states may not restrict abortion except to require that the procedure be performed by a physician.

In the second trimester, states may regulate abortion services in ways which promote women's health, such as licensing clinical facilities and controlling the qualifications of people who may perform the procedure. Whether or not individual states choose to regulate abortions within the specified parameters, and the Court expressed no opinion as to the desirability of such regulation, the states have no legally cognizable "interest" in the embryo or fetus throughout the first six months of pregnancy.

It is only during the third trimester, when the fetus is defined as "viable" -- capable of "meaningful life" outside the womb -- that states may claim an interest in protecting "potential life." During the final three months, states may regulate, or even proscribe, abortion, except where it is necessary for the preservation of the life or health of the woman. Although abortions may be prohibited in the final months of pregnancy, the fetus itself is not deemed to be a person with legal rights until birth, as was the case at common law.

Doe v. Bolton,[15] the companion case to Roe, has been less well known than Roe; yet, it also represented an extremely important milestone. The Georgia law at issue had been reformed in 1968, as the state attempted to avoid the glaring constitutional infirmities of older laws such as the one in Texas.[16] The new law required that abortions be certified by three licensed physicians as necessary to a woman's life or health, performed in accredited hospitals, and approved by a hospital committee; it also allowed a waiver of the "necessity" requirement in

cases of rape or serious fetal anomaly. The Court held that because abortion had become a safe medical procedure, these restrictions went beyond what was needed to advance the state's legitimate interest -- protection of women's health. By invalidating a reformed statute as well as a nineteenth century one, the Court articulated a right to choose abortion that was meaningful in all fifty states.

Roe and Doe freed women across the nation to conduct their intimate lives as they judge proper. For the ability to control fertility determines whether women can govern their lives; without that power, women spend roughly half their years as slaves to biology and captives of chance. Even when women use the most reliable contraception available, conscientiously, statistics indicate that almost half of them will become pregnant at least once during their reproductive years, without intending to do so and in spite of their best efforts.[17] And control over reproduction is more than just a matter of biology; it empowers women with the knowledge that they need not live in fear of another pregnancy, that they have options. Seeing herself less as an incubator and more as an independent, capable person, each woman is free to develop her own sense of identity and self-esteem, and to lead a life of self-determination and dignity.

Often there is a misapprehension that support for reproductive choice, including abortion rights, is selfish, "unnatural," and incompatible with a concern for the well-being of families. In reality, quite the opposite is true. Women are the primary caretakers in our society, and enhancement of the well-being of women is integral to the stability and well-being of their families. Families benefit when women choose to have abortions in order to care adequately for existing children. Families benefit when women choose abortion in order to get education and employment that will allow them to become better providers. Women exercise their reproductive choices in an effort to create the quality

family lives that should be possible for all people in our society -- women, men and children equally. They may choose to enlarge their families or not to bear children -- but it is their choice to make.

Due to the absence of a legitimate governmental reason for compelling them to continue unwanted pregnancies despite the other claims upon their lives, women are now reassured that, when they believe it is appropriate in their respective circumstances, abortion remains an option. Because of Roe and Doe, therefore, women no longer need to submit to the hazards and terrors of illegal abortions, as history shows they inevitably do when safe and legal abortion services are denied. Thus, both analytically and practically, the right to choose abortion is for women an essential guarantor of all other basic rights and freedoms.

C. JUDGE BORK WOULD ENDANGER FEDERAL PRIVACY RIGHTS

In the fourteen years since Roe and Doe, a steady stream of United States Supreme Court cases has affirmed and refined the basic constitutional doctrine of reproductive privacy.[18] In addition, both state and lower federal courts have used this measuring stick when presented with laws purporting to regulate or proscribe abortion. As a result, despite the efforts of some state legislatures to undermine abortion rights, the accumulated weight of precedent supporting the "fundamental right of privacy" in the abortion context has become enormous.

In recent years, however, Supreme Court support for the constitutional right to privacy has dwindled from seven justices to four. Moreover, Chief Justice Rehnquist and Justice White have never agreed that federal constitutional norms apply in the abortion context. Dissenting in Roe v. Wade and the later cases, they have maintained (1) that the preservation of fetal life, as against maternal "inconvenience,"[19] can be a legitimate state interest; and (2) that this

controversial matter should remain a question of state law.[20] The language of their opinions leaves little doubt that they both reject abortion rights jurisprudence in its entirety. Justice Scalia has never ruled in an abortion case. Since he joined Judge Bork's opinions in Dronenburg v. Zech and Vinson v. Taylor, however, we believe it is probable that he would vote with Chief Justice Rehnquist and Justice White. (See Appendices 10 and 12)

On the other hand, Justice O'Connor has not directly faulted constitutional protection for a woman's abortion decision. Instead, she takes the position that, since a woman's right to seek an abortion is not an unqualified one, the Court should ask merely whether a given state restriction "unduly burdens"[21] that right. Since she believes there is no principled way for courts to differentiate between the value of "potential" human life at the various stages from conception to birth,[22] she urges that the "unduly burdensome" inquiry be applicable at all stages of pregnancy.[23] Yet this analytical distinction is not seen as offering meaningful protection for reproductive privacy because, of the myriad restrictive provisions invalidated by the Court in 1983 and 1986, she has so far never found one to be "unduly burdensome."

The Supreme Court has the authority to reverse Roe; and the anti-abortion minority has been pushing for reversal since 1973. Their views have never commanded more than limited support nationwide, but the Justice Department added fuel to their fire during the Thornburgh v. ACOG litigation by urging the Court to repudiate the reasoning set out in Roe.[24] Were the Court to do so, litigation would erupt nationwide and availability of abortion services would evaporate overnight in more than half the states.[25]

Yet, at this point in history, such action would be extremely radical because it would require overthrowing an enormous body of settled law, odd

behavior for self-proclaimed advocates of "judicial restraint." The Court is charged with producing a coherent theory of individual rights that applies not only to abortion and contraception, but also -- as only a few examples -- to forced sterilization,[26] state restrictions on marriage,[27] and interference with parental rights.[28] The principles that have vindicated abortion rights in more than a dozen Supreme Court cases also undergird the landmark decisions securing American citizens from arbitrary state interference with private relationships. Supreme Court abandonment of these principles would present the horrifying specter of our crowded, high-technology society stripped of its most elementary protection of personal integrity.

Yet neither can we be reassured by predictions that the Court would hold back from overruling Roe. Without explicitly rejecting the right to privacy, or necessarily disturbing other constitutional principles in the family law area, the Court could effectively nullify the right to choose abortion in either of two ways. The Court could alter the standard of review such that states face a lesser burden of justification for their anti-abortion laws; this would be Justice O'Connor's preferred approach. Alternatively, the Court could find an increased constitutional interest in fetal life, which states would be permitted to protect; this course is suggested by the views of Chief Justice Rehnquist and Justice White.

Of these two possibilities, the second is particularly threatening to women because it could encourage, or even require, states to favor fetal interests over the interests of adult women in a host of extreme ways. The specter that presents itself is of state police power employed to ensure that women adhere to whatever medical, dietary, exercise, or scheduling regimes a third party may deem in the best interests of a developing fetus. The recent criminal prosecution of

Pamela Rae Stewart for prenatal child abuse, on the grounds that she had failed to follow her doctor's orders, shows that such concerns are not far-fetched.[29]

NARAL opposes confirmation of Robert Bork as Associate Justice of the Supreme Court because he would create a majority that no longer recognizes and protects women's right to make personal decisions about childbearing without coercive state interference. His appointment would place the health and well-being of millions of American women and their families in severe jeopardy.

D. ABORTION RIGHTS ARE VULNERABLE IN THE STATES

As we hypothesize a radically changed federal landscape, it is impossible to predict what restrictive power the Supreme Court might allow the states. Yet, it is clear that in any case, if left to the vagaries of the state legislatures, this basic right would vanish completely in many jurisdictions, and in others it would be curtailed by the many limitations that states would be free to enact or reactivate. Our study of state abortion laws[30] has led us to conclude that the right to legal abortion would be vulnerable in more than half of the states.

By the time the Roe v. Wade opinion was written, at least twenty-eight state legislatures had considered enacting legislation relaxing their restrictions on abortion; seventeen had done so at least somewhat. (See Appendix 1, Map A) It is important to note that the abortion laws of the fifty states and the District of Columbia defy precise categorization -- each is unique. However, since many states modeled their post-1973 abortion laws on the parameters of Roe and Doe, we grouped the laws generally according to how they compared -- whether more, less, or similarly restrictive -- to that benchmark. (Appendix 1, Map B)

In some cases, the intentions of the state legislatures regarding abortion

have been stated. Five states[a] have passed "contingency clauses": statements of intent to forbid abortion as soon as judicially or legislatively allowable (i.e., if Roe v. Wade were reversed, or a Human Life Amendment passed). Of these, South Dakota and Idaho have laws designed to take effect automatically; and South Dakota's law does not even include an exception allowing preservation of the woman's life. In addition, the laws in seven states[b] include statements of desire to protect fetal life, showing that it is only under protest that they adhere to the federal constitutional requirements.

Today the law of the land allows some regulation of abortion after the first trimester "in ways that are reasonably related to maternal health"; yet, twenty-five states[c] and the District of Columbia have laws on their books which are more restrictive than the Roe v. Wade provisions. (See Appendix 1, Map B) Most of these have been at least partially enjoined; some have been declared unconstitutional by state attorneys general; a few have never been challenged and are understood to be unenforceable.

Massachusetts and Nevada have conflicting laws on the books -- new statutes were added without the repeal of the older, currently unconstitutional, statute. While we can assume that a major change in the Roe doctrine would generate litigation in most states and a great many new laws, it is particularly difficult to assess the immediate post-change status of legal abortion in these states.

State statutes contain provisions limiting access in combinations of the

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a Idaho, Illinois, Kentucky, Louisiana, South Dakota.

b Connecticut, Indiana, Missouri, Montana, Nebraska, North Dakota, Pennsylvani

c Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, Wisconsin.

following ways:

1) Restricting the place and provider of the abortion, and sometimes requiring another physician's presence for the benefit of the fetus.
2) Requiring that a panel of two, three or more doctors deem the abortion necessary.
3) Requiring special and often extensive reporting of medical and personal information.
4) Requiring in-state residency.
5) Requiring consent or notice of a spouse (even if estranged), and/or of one or both parents in the case of minors.
6) Requiring the abortion provider to read a state-authored text designed to dissuade women from having an abortion.

Whether these often burdensome measures improve women's health at all, and do not simply limit their access to abortion, is plainly dubious.

Fourteen states[d] retain statutes mandating the involvement of a woman's husband (either notice or his consent) in her decision to obtain an abortion, despite the fact that all ten laws that have been challenged have been declared unconstitutional. (See Appendix 1, Map C)

Thirty-five states currently have statutes regulating minors' access to abortion services by requiring parental involvement -- fifteen[e] by requiring the abortion provider to notify one or both parents; twenty-two[f] by requiring that one or both parents give their consent to the abortion. (Appendix 1, Map D)

For some women, the state laws which most restrict access to abortion are

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d Arkansas, Colorado, Florida, Illinois, Kentucky, Louisiana, Montana, North Dakota, Nevada, Rhode Island, South Carolina, South Dakota, Utah, Washington.

e Arizona, Georgia, Idaho, Illinois, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, Ohio, Tennessee, Utah, West Virginia, Wisconsin.

f Alabama, Alaska, Arkansas, Arizona, California (as of 9/10/87), Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Mississippi, North Dakota, New Mexico, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington.

those which restrict funding -- either by precluding the use of government funds or by specifying that the cost of an abortion may not be covered on regular health insurance policies.[31] Only eight states[g] and the District of Columbia voluntarily pay for abortions for women who depend on the government for health services, six others[h] do so under court order. Six states[i] pay for abortions only when pregnancy resulted from rape or incest, or when it endangers the woman's life. All other states fund abortions only when necessary to save the woman's life. (Appendix 1, Map E)

This array of restrictive laws has led us to fear that if the Supreme Court grants the states more authority to limit abortion it will be taken as approval of such restrictions and as an invitation to enact them. Those state legislators who have been nominally pro-choice because they tend to favor the status quo may then support a restrictive law because they perceive the new Supreme Court standard as a strong suggestion of what is constitutionally appropriate.

Our basic rights are a matter of principle. They must never be made vulnerable to either the shifting tides of arbitrary public opinion or pork barrel politics. But beyond the fact that it is constitutionally impermissible for the basic rights of any group to be auctioned by a legislature, it is important to note that state legislatures have been and are still peculiarly undemocratic on the subject of women's reproductive rights.

Polling data show that abortion rights are now widely accepted and assumed by an 81% majority of the American public. (See Appendix 2) Yet state lawmakers

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g Alaska, Hawaii, Maryland, New York, North Carolina, Oregon, Washington, West Virginia.

h California, Connecticut, Massachusetts, Michigan, New Jersey, Vermont.

i Iowa, Minnesota, Pennsylvania, Virginia, Wisconsin, Wyoming.

consistently ignore their pro-choice majority constituents. As in the Southern state legislatures following Brown v. Board of Education, state legislative activity is often characterized by hostility to women's rights and a resentment of federal authority. Again like the civil rights struggle of Black Americans, there has been an organized resistance to women's achievement of basic rights. The strategy of the anti-choice forces has been to sponsor a plethora of restrictive laws, and to flood the courts with legal challenges to Roe v. Wade. (See Appendix 7)

Those who oppose the right to choose abortion often claim that it was undemocratic for the courts, rather than the legislatures, to have established this rule. In fact, the opposite is true. The history of Connecticut, where the anti-contraception law prompted the Griswold case, indicates how a majority can fail, despite facially democratic procedures, to influence the legislature when reproductive issues are concerned. The nineteenth-century anti-contraception statute in Connecticut was first targeted for repeal in 1923. Repeal bills were unsuccessful in every session of the legislature for forty years, until finally birth-control proponents lost heart and tried another method -- the courts. Yet Connecticut had one of the lowest birth rates in the nation, indicating widespread use of contraceptives. The answer to this paradox seems to be that the Catholic Church was powerful enough to threaten reprisals against legislators who were not themselves Catholic.[32] Thus, as late as 1965, Connecticut women had to go to clinics in New York or Rhode Island for contraceptives;[33] and until 1973 they went to New York for legal abortion services, with hazardous delay often resulting from the long-distance travel. (See Appendix 3)

The Founders were wise in entrusting our liberties not to one branch of government only. The system of checks and balances has, on the issue of

reproductive privacy, assured that women would not be at the mercy of doctrinaire minorities who may from time to time control the legislative branch of government.

E. ROE v. WADE, WOMEN'S EQUALITY, AND THE BORK NOMINATION

> *"I am convinced . . . that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."*[34]

****

Robert Bork's constitutional philosophy includes three features that ought to trouble those who support women's liberty, and abortion rights in particular. First, in his view the Bill of Rights ought to be read literally and narrowly.[35] He rejects outright the established constitutional doctrine that personal decisionmaking is protected by an implied right of privacy. This view ignores much of our basic history; for the Constitution could never have been ratified without the promise -- eventually embodied in the Ninth Amendment -- that individual integrity would be secure from invasions by the new government.

Second, when he urges that judicial understanding of broad constitutional concepts like liberty and equality ought to be constrained by "original intent,"[36] he would limit twentieth century courts to eighteenth century assumptions about race, sex, and class. In the absence of an Equal Rights Amendment, women are particularly vulnerable to his text-based absolutism.

Third, his view that courts ought to be extremely deferential to legislative and executive authority amounts to a rejection of judicial responsibility to protect individual rights -- especially the rights of those less able to defend themselves in the political process. That responsibility is central to our

system of checks and balances and has remained a preeminent theme throughout our history.

His devotion to "restraint" does not, however, mean a devotion to legal continuity or social stability. Although American women now assume that the rights acknowledged in decisions such as Roe v. Wade and Griswold v. Connecticut are essential, Judge Bork sees legal "truth" as trumping such assumptions.[37]

His colleagues have pointed out the hypocrisy of Judge Bork's posture as the apostle of judicial restraint, since Judge Bork has shown little compunction about asserting his own unusual views aggressively and in dubious contexts.[38] Judge Bork has even inspired those of his peers who agree with his disposition of particular cases to disclaim connection with his extreme rhetoric.[39]

Robert Bork believes that courts must be extremely deferential to legislative activity regarding matters of "morality." He explains that he is a "value skeptic," by which he means that there is no principled way to decide that one set of moral values is "better" than another. Therefore, he concludes, a vote of the majority is the only fair way for society to choose:

> *"[T]here is no uniform national consensus concerning the moral standards that are now being imposed by the judiciary . . . the liberty of free men, among other things, is the liberty to make laws, which is increasingly being denied . . . Roe v. Wade is the classic instance . . . When the court nationalizes morality by making up these consitutional rights, it strikes at federalism . . . in a central way."*[40]

After the Founders drafted the Constitution, they designed the Bill of Rights to check the power of self-interested, and often vicious, majority rule. When Judge Bork argues that questions of "morality" should remain with local ballot boxes, even when fundamental individual liberties are being trampled, he conveniently forgets this basic history.

Likewise, those who define the abortion rights debate as one between "pro-abortion" groups and "anti-abortion" groups deliberately misstate the point.

These two groups of advocates do not take equivalent and opposite moral stances. Those who support the "right to choose" do not stand in favor of a particular choice -- such as, abortion instead of gestation. Instead, they stand for individual freedom to wrestle with personal and moral issues, while government keeps a respectful distance. And they assume that, in a pluralistic society, a variety of decisions and behaviors is both inevitable and beneficial despite the degree of discomfort one person's choice may cause to another person.

This norm of individual freedom is antithetical to the "anti-choice" assertion of moral authority to impose a preferred set of values on society as a whole, including minorities with differing moral views. A judge who upholds individual liberty of conscience, especially in hard cases, will find support in every document from the Constitutional Convention. The reverse is true for an imposition by majoritarian vote of moral absolutism.[41]

In a 1984 case wherein he launched a full-scale assault on privacy doctrine, Judge Bork's peers on the D.C. Circuit were not at all convinced by his claim of "value skepticism." On the contrary, his language was so lacking in respect for the Supreme Court that it drew their harsh criticism:

> *"[W]e believe that [Judge Bork's opinion] substituted [his] own doctrinal preferences for the constitutional principles established by the Supreme Court."*[42]

Judge Bork has criticized directly what he describes as judicial creation of "new rights." He defines these as all rights lacking "explanatory principle [in] existing textual rights suggest[ed] [by] the contours of a value already stated in the document or implied by the Constitution's structure and history."[43] Of these "new rights," the right to privacy has received Judge Bork's most frontal attack:

> *"The 'penumbra' [considered to be the source of the right of privacy] was no more than a perception that it is sometimes necessary to protect actions or*

associations not guaranteed by the Constitution in order to protect an activity that is. The penumbral right has no life of its own as a right independent of its relationship to a first amendment freedom. Where that relationship does not exist, the penumbral right evaporates."[44]

Since decision-making regarding personal health and sexual behavior does not involve first amendment political activity, Judge Bork believes that the Court created an illegitimate "new right" in Griswold. Quoting Justice White, Judge Bork has demonstrated the vehemence of his opposition to constitutional privacy by asserting that judicial protection of such rights makes the Court "most vulnerable" and brings it "nearest to illegitimacy."[45] Regarding whether a woman's decision to terminate her pregnancy is protected by the constitutional right to privacy, Judge Bork has stated that:

"I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[46]

Unlike most members of the bench, Judge Bork believes the Supreme Court ought not to be reluctant to overrule past precedent in constitutional cases. As a result, we must take seriously the possibility that, given the chance, Judge Bork could well disapprove the constitutional right of privacy completely, since Supreme Court recognition of this most comprehensive of rights is a twentieth century development. He has expressed similar lack of respect for the line of cases that recognizes the "fundamental" nature of a host of individual rights, including marriage, childbearing, and parenting.[47]

Women are especially vulnerable in Bork's textually absolutist world. Concerning equal protection, he has asserted that, "The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities."[48] Since gender is glaringly absent from this list, we must wonder whether Bork would take non-passage of the Equal Rights Amendment as a majoritarian mandate against "equal protection" of women.

His lack of interest in or compassion for women is evident in many of his opinions. One dramatic example can be seen in his response to a challenge to American Cyanamid's "fetal protection policy;" that policy bars women of childbearing age from jobs which might involve exposure to dangerous levels of lead unless they consent to be sterilized. Judge Bork declined to apply the worker protection principles of the Occupational Safety and Health Act, construing the statute very narrowly as applying solely to working conditions, not to company policies enacted to govern those conditions. According to his legal philosophy, such a reading is required because the concerns of women workers were not at issue when the Act was written. Moreover, what he saw as a "moral" component of the dispute fortified his conclusion that the court should refuse to offer relief:

> *"These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy . . . The women involved in this matter were put to a most unhappy choice. But no statute redresses all grievances, and we must decide cases according to law."*[49]

Judge Bork's remarkable insensitivity to women's concerns is perhaps most vivid in his 1985 analysis of why sexual harassment ought not be treated as sex discrimination. His views appear in his dissent from the en banc denial of rehearing in Vinson v. Taylor.[50] That he is worse than reactionary is clear from the fact that the circuit court was affirmed 9-0 by the U.S. Supreme Court in an opinion written by Justice Rehnquist. Judge Bork claims to have a "doctrinal difficulty" in classifying harassment as discrimination. In his view, a woman's claim cannot accurately be called "sex discrimination" because unwelcome sexual advances are not made solely and without exception to members of the opposite sex. He concludes that because a bisexual supervisor could conceivably use his, or her, authority to solicit sexual favors from male and female employees

interchangeably, the cause of action is "artificial."[51]

Considering that his supporters assert that his "neutrality" is one of the judge's most important virtues, it also seems worth noting that Bork employs a blatant double standard when assessing the damage that sexual harassment does to workplace morale. When a male superior harasses a female employee, Judge Bork admits that the behavior is "reprehensible," but he is troubled by the difficulty of determining when a woman's participation may be voluntary. He concludes that the court ought not to recognize her claim. Conversely, with respect to men who engage in sexual activity with men over whom they have supervisory authority, Judge Bork has no trouble condemning the behavior:

> *"common sense and common experience demonstrate . . . [that] [e]pisodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous . . . ."*[52]

Judge Bork may or may not have a legitimate concern that military discipline would suffer if sexual behavior between servicemen were to be sanctioned. Yet anyone who desires to see our society plagued less systematically by sexual abuse of women must be appalled at the contrast between, on the one hand, his eagerness to mete out swift and uncompromising punishment in Dronenburg and, on the other, his protestations of confusion and judicial helplessness in Vinson.

Many judges, like Justice Powell, do see the judicial role as limited. Yet, they nonetheless approach their duties with compassion and an ability, when appropriate, to respond to the plight of those who have been and persistently continue to be powerlessness in the legislative process. Judge Bork has rejected this responsibility:

> *"[U]nless the Constitution . . . says this minority is protected in these ways, then I think the judge must remit this minority to the democratic process. I think this is a very civilized and fair nation; I don't think being remitted to the democratic process is a sad fate for most people."*[53]

F. CONCLUSION: NARAL OPPOSES ROBERT BORK

The Reagan administration has nominated Robert Bork to the U.S. Supreme Court because he is a creative and effective legal reactionary. Using the language of "original intent" and "judicial restraint," he sets forth an approach to constitutional law that voids personal privacy as well as women's claim to equal protection. Like most arch-conservatives, he presumes that the marketplace works, that the political system is fair, that democratically enacted legislation is constitutional, and that government agencies generally act in good faith. What makes Bork unusually dangerous, however, is that his prescription of very deferential judicial behavior and fidelity to eighteenth century assumptions would unbalance our three-part system of government. He would dismantle the mechanism that has throughout our history kept these various power-brokering systems accountable to constitutional principles.

Since his July 1, 1987 nomination to the Supreme Court, much attention has been paid to Judge Bork's expressed hostility to constitutional privacy, especially as it protects a woman deciding to choose abortion. Predictably, when this history of hostility inspired close questioning by members of the Senate Judiciary Committee, the harshest edges appeared to have been smoothed from his theory. Yet, his suggestions that he would be receptive to new arguments in favor of constitutional privacy and women's equal rights are unconvincing. The radical jurisprudence he has been expounding forcefully for years from both the bench and the podium leaves no doubt about the crabbed contours of the rights he would be willing to vindicate were he to sit on the Supreme Court. In all fairness to their female constituents, the Senators must reject this nomination.

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ENDNOTES

1. 410 U.S. 113 (1973).

2. Thornburgh v. ACOG, 106 S. Ct. 2169 (1986).

3. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

4. First Amendment: Stanley v. Georgia, 394 U.S. 557, 564 (1969). Fourth and Fifth Amendments: Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886). See also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Ninth Amendment: Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Fourteenth Amendment: Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Bill of Rights generally: Griswold v. Connecticut, 381 U.S. 479, 484-85.

5. Marriage: Loving v. Virginia, 388 U.S. 1, 12 (1967). Procreation: Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942). Contraception: Eisenstadt v. Baird, 405 U.S. 438, 453-54. Family relationships: Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Child rearing and education: Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

6. Griswold, 381 U.S. at 484.

7. Pollack, The Griswold Case, 27 Oh. St. L. J. 559 (1966).

8. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

9. Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978).

10. NAACP v. Alabama, 357 U.S. 449 (1958); Cousins v. Wigoda, 419 U.S. 477 (1972).

11. See, e.g., Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971).

12. See, e.g., J. C. Mohr, Abortion in America: Origins and Evolution in National Policy, 1800-1900 (1978). Mohr notes that because late nineteenth century women wanted, unlike their predecessors, to have fewer children, there seems to have been an enormous increase in the number of abortions, which caused the issue to become a subject of public debate. The many statutes that were then enacted are known collectively as the "Comstock Laws," after Anthony Comstock, the Catholic social crusader who led the campaign against abortion and other "vice."

13. Similar laws were in effect in the following states: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

14. Norma McCorvey has since come forward and said that she was not raped. She has explained that she told her doctor the lurid story because she desperately wanted an abortion and she was afraid, rightly, that she would be denied one. Her story exemplifies the humiliating lengths to which women are driven by restrictive abortion laws.

15. 410 U.S. 179 (1973).

16. The following states had similar "reformed" statutes in effect when Roe and Doe were decided: Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina and Virginia. Only Alaska, Hawaii, New York and Washington permitted abortions when a woman and her physician agreed that it was appropriate.

17. Hardin, Mandatory Motherhood at 18 (1974). In the chapter entitled "The Indispensible Backdrop," Hardin states that even birth control pills provide only 99% protection, which allows for half a million unwanted pregnancies each year. Less perfect systems have even greater failure rates, such that 97% perfect systems used properly over thirty years produce only a 60% probability of avoiding unwanted pregnancy.

18. Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976) (parental consent may be required as long it does not "unduly burden" the minor's right to seek abortion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (women may not be required to obtain their husbands' consent to abortion because, although the man's interest in the pregnancy may be "deep and proper," the woman is "more directly and immediately affected"); Carey v. Population Services International, 431 U.S. 678 (1977) (struck down requirements that contraceptives (1) only be distributed by pharmacists and (2) only be provided to minors by physicians); Maher v. Roe, 432 U.S. 464 (1977) (state may omit coverage for "nontherapeutic" abortions from Medicaid program, despite funding for childbirth, without either burdening the fundamental right to choose abortion or violating the equal protection clause because deletion of abortion coverage does not place poor women in worse straits than they would be in without any state health plan); Colautti v. Franklin, 439 U.S. 379 (1979) (struck down as vague and an interference with the physician/patient relationship a criminal law requiring use of that abortion technique most likely to preserve fetal life in all cases where there is "sufficient reason to believe the fetus may be viable"); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) (parental consent requirements unconstitutional unless judicial bypass procedure is available to minors); Harris v. McRae, 448 U.S. 297 (1980) (upheld the federal Hyde Amendment bar of federal Medicaid funds for most medically necessary abortions); H.L. v. Matheson, 450 U.S. 398 (1981) (upheld parental notification requirement); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)

(struck down requirements that: (1) all second trimester abortions be performed in hospitals -- a medically unjustified burden on access to a "safe" procedure; (2) physicians read from a prepared script asserting that "the unborn child is a human life from the moment of conception," detailing physiological development of the fetus, and warning that abortion may cause trauma -- interference with doctor/patient relationship designed to change the woman's decision; (3) 24-hour waiting period -- medically unjustified); Thornburgh v. ACOG, 106 S. Ct. 2169 (1986) (affirming Akron, stuck down requirements of prepared script, detailed reporting, waiting period, second physician, and efforts to preserve fetal life).

19. Roe v. Wade, 410 U.S. at 221 (White, J., dissenting).

20. Roe v. Wade, 410 U.S. at 174 (Rehnquist, J., dissenting)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

21. She cites Bellotti v Baird (Bellotti I), 428 U.S. 132 (1976) and Maher v. Roe, 432 U.S. 464 (1977) as sources for the "unduly burdensome" standard.

22. She concludes that the Court's analysis in abortion cases should be changed because, even "assuming that there is a fundamental right to terminate a pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in Roe and employed by the Court today on the basis of stare decisis . . . The Roe framework [is] clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." Akron v. Akron Center for Reproductive Health, 103 S. Ct. at 2508 (1983) (O'Connor, J., dissenting).

23. 103 S. Ct. at 2509.

24. See Introduction by Rosalind P. Petchesky to Brief Amici Curiae of the National Abortion Rights Action League in support of appellees, Thornburgh v. ACOG, No. 84-495 (U.S. filed Sept. 26, 1984). See Appendix 6.

25. It is important to keep in mind that, unlike most medical matters, abortion regulations are generally enforced by the criminal law instead of by medical review boards. Because the threatened penalties are so severe, physicians licensed to perform abortions are wise to err on the side of caution if they are at all unsure of the legal status of abortion in their state. The statute books in the states are at present replete with unenforceable abortion laws. Many have been enjoined following litigation; others have been declared unconstitutional in state attorney general opinions; and still others, never challenged, are merely understood to be at least partially invalid. Some states have amended their laws to conform with federal norms; in more than half the states, however, the invalid statutes remain on the books. In virtually every instance where a state law has been declared faulty, the decision has been grounded upon Roe and Doe. Thus, were these precedents to be reversed, health care professionals in many jurisdictions

would provide abortion services at their own peril -- at least until preliminary court action took place. Litigation would certainly flood the courts, with the outcomes varying from state to state based on prior determinations of state legislative intent before and since Roe, guided by the Supreme Court's new standard, and myriad issues of state law.

26. See Skinner v. Oklahoma, 316 U.S. 535 (1942)(invalidated the Habitual Criminal Sterilization Act, which provided for compulsory sterilization after conviction of a third felony involving "moral turpitude"; the Court noted that "marriage and procreation are fundamental").

27. Zablocki v. Redhail, 434 U.S. 374 (1978)(struck a law requiring court approval for the remarriage of any person under an obligation to pay child support; freedom to marry is "fundamental" and any state restrictions must undergo the strictest scrutiny); Loving v. Virginia, 388 U.S. 1 (1967) (struck a law against inter-racial marriage because, in violation of the equal protection and due process guarantees of the Fourteenth Amendment, it interfered with the "fundamental freedom" to marry).

28. See Stanley v. Illinois, 405 U.S. 645 (1972)(although not married to the deceased mother, a father had an important interest in the care and companionship of his children and so was entitled at least to a hearing before the state removed them for placement elsewhere); Moore v. City of East Cleveland, 431 U.S. 494 (1977) ("nuclear family" zoning ordinance that prevented a grandmother from living with her two grandsons violated their Fourteenth Amendment due process rights with respect to family privacy and libert

29. People of California v. Stewart, No. M508197 (Cal. Mun. Ct. San Diego Cty., filed Sept. 26, 1986).

30. We reviewed state laws on the books in the fifty states and the District of Columbia as of January, 1987. This study is an ongoing one, and our conclusions are modified as new laws are enacted.

31. For example, Missouri's insurance law states, "No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium." Mo. Ann. Stat. t 376.805. Similar restrictions seem to be appearing with increasing frequency.

32. C. T. Dienes, Law, Politics and Birth Control at p. 146 (1972).

33. Planned Parenthood League of Connecticut, Scrapbook, pages unnumbered (1983). On file with the National Abortion Rights Action League.

34. Testimony of Robert Bork before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. p. 310 (June 1, 1981)(U.S. Gov't Serial No. J-97-16)(hearings regarding constitutionality of proposed Human Life Bill). See Appendix 8.

35. As then Professor Bork explained it:

"I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone too far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government that we have."

Testimony of Robert H. Bork, Nominee to the District of Columbia Court of Appeals, p. 2 (Jan. 27, 1982)(Statement before the Senate Judiciary Committee)(emphasis added).

36. *"I do not know any way to apply the Constitution that I regard as legitimate other than in terms of the intent of the framers, as best as that can be determined."*

Testimony of Robert H. Bork, Nominee to the District of Columbia Court of Appeals, p. 4, 10 (Jan. 27, 1982)(Statement before the Senate Judiciary Committee).

37. *"[I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court."*

Testimony of Robert H. Bork, Nominee to the District of Columbia Court of Appeals, p. 10 (Jan. 27, 1982)(Statement before the Senate Judiciary Committee).

"Since the legislature can do nothing about the interpretation of the Constitution given by a court, the court ought to be always open to rethink constitutional problems . . . [A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent."

"A Talk with Judge Robert H. Bork," District Lawyer, May/June 1985, p. 32.

38. *"We are deeply troubled by the use of the panel's decision [by Bork in Dronenburg] to air a revisionist view of constitutional jurisprudence. The panel's extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court . . . Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court . . .*

"We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower federal courts to 'create new constitutional rights' . . . surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home."

Dronenburg v. Zech, 746 F.2d 1579, 1580 (citations omitted)(dissent from

denial of rehearing en banc). See Appendix 10.

39. *"It is true that, in its discussion of the alternative basis, the panel opinion airs a good deal more than disposition of the appeal required . . . I read the opinion's extended remarks on constitutional interpretation as a commentarial [sic] exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of 'the court.'"*

Dronenburg v. Zech, 746 F.2d at 1582 (Statement of J. Ginsburg in response to the Robinson, Wald, Mikva and Edwards dissent from denial of rehearing).

40. Robert Bork, "Foundations of Federalism: Federalism & Gentrification" (April 24, 1982)(unpublished speech delivered to the Yale Federalist Society).

Thus, according to Bork's political theory:

"When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason."

Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984)(emphasis added)(upholding the Navy's "common sense" authority to discharge, without specific justification, all gay men). It is important to note that, sitting on the District of Columbia Circuit, Judge Bork has had limited opportunity to hear cases that turn on questions of basic constitutional rights because that court hears a disproportionate number of appeals involving federal administrative and regulatory matters. Thus, we must extrapolate from the few cases in which he has discussed his views of the courts' role in protecting individual rights.

41. NARAL's mandate is to work to ensure that women's intimate decision-making about reproduction remains free; and we are obviously most interested in the privacy principle as it protects a woman's right conscientiously to choose to terminate an unwanted pregnancy. But, those of us concerned with protecting women's right to choose abortion cannot help being worried when we see that, for example in Bowers v. Hardwick (the Georgia sodomy case), the Supreme Court is willing to sacrifice the principles of individual liberty and privacy just because many people in this country hold a particular opinion about what constitutes "moral" conduct. The fact that Justice White declared that gay people are not entitled to the basic constitutional right of privacy, with no greater explanation for his decision than majoritarian morality, should worry everyone in this country who treasures the freedom to make his or her own moral and ethical decisions.

42. 746 F.2d at 1581.

43. Dronenburg v. Zech, 741 F.2d at 1395.

44. Dronenburg v. Zech, 741 F.2d at 1392.

45. Dronenburg v. Zech, 741 F.2d at 1396 (citing the dissent in Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977), in which Justice White rejected the substantive due process claim of a woman prevented by a "nuclear family" zoning ordinance from living with her two grandsons).

46. Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. p. 310 (June 1, 1981)(U.S. Gov't Serial No. J-97-16). See Appendix 8.

47. See Dronenburg, 741 F.2d at 1393. Judge Bork takes the position that Loving v. Virginia, 388 U.S. 1 (1967), which struck down a Virginia anti-miscegenation statute, should be read based on the Fourteenth Amendment prohibition of race discrimination, despite often cited language in the case describing the right to marry as "fundamental."

48. Dronenburg, 741 F.2d at 1397.

49. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984) (reversing the OSHA invalidation of Cyanamid's policy).

50. 760 F.2d 1330 (1985), aff'd sub nom. Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) (unanimous decision of the Court). See Appendix 12.

51. Vinson v. Taylor, 760 F.2d at 1333, n.7.

52. Dronenburg, 741 F.2d at 1398 (Navy petty officer with nine-year "unblemished service record" subject to immediate military discharge for engaging in private consensual sexual activity with seaman recruit). See Appendix 10.

53. "Justice Robert H. Bork: judicial restraint personified," California Lawyer, at p. 26 (May 1985).

Judge Bork's colleagues have criticized him for refusing to discharge responsibly this aspect of the judicial function:

"Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to 'interpretation' is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected."

Dronenburg v. Zech, 746 F.2d at 1580 (dissent from denial of rehearing en banc.)

APPENDICES

1. Maps illustrating state abortion laws:

   A. Abortion Legality before Roe v. Wade
   B. State Laws Compared with the Roe Standard
   C. Compulsory Spousal Involvement
   D. Restrictions on Minors
   E. Medicaid Funding Availability.

2. Marttila & Kiley, Inc., "National Survey of Attitudes Toward the Suprteme Court and the Bork Nomination," August 1987.

3. Alan Guttmacher Institute, Issues in Brief, "Abortion in the U. S.: Two Centuries of Experience," January 1982.

4. Roe v. Wade, 410 U.S. 113 (1973). Synopsis and full text of decision.

5. Excerpt from Brief for Appellant, Roe v. Wade, No. 70-18 (Fall Term 1971).

6. Brief Amici Curiae of the National Abortion Rights Action League in support of Appellees, Thornburgh v. ACOG, No. 84-495 (U.S. filed Sept. 26, 1984).

7. Memorandum by the American Civil Liberties Union Reproductive Freedom Project regarding "Reversing Roe v. Wade Through the Courts," an Americans United for Life conference, held on March 31, 1984 in Chicago, Illinois.

8. Testimony of Robert Bork before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., p. 310 (June 1, 1981)(U.S. Gov't Serial No. J-97-16)(hearings regarding constitutionality of proposed Human Life Bill, S. 158).

9. "Federalism and Gentrification," unpublished speech by Robert Bork to Yale Federalist Society, April 24, 1982.

10. Dronenburg v. Zech, 741 F. 2d 1388, (opinion by J. Bork), 746 F.2d 1579 (1984).

11. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (1983) (dissent by Circuit Judge Bork only).

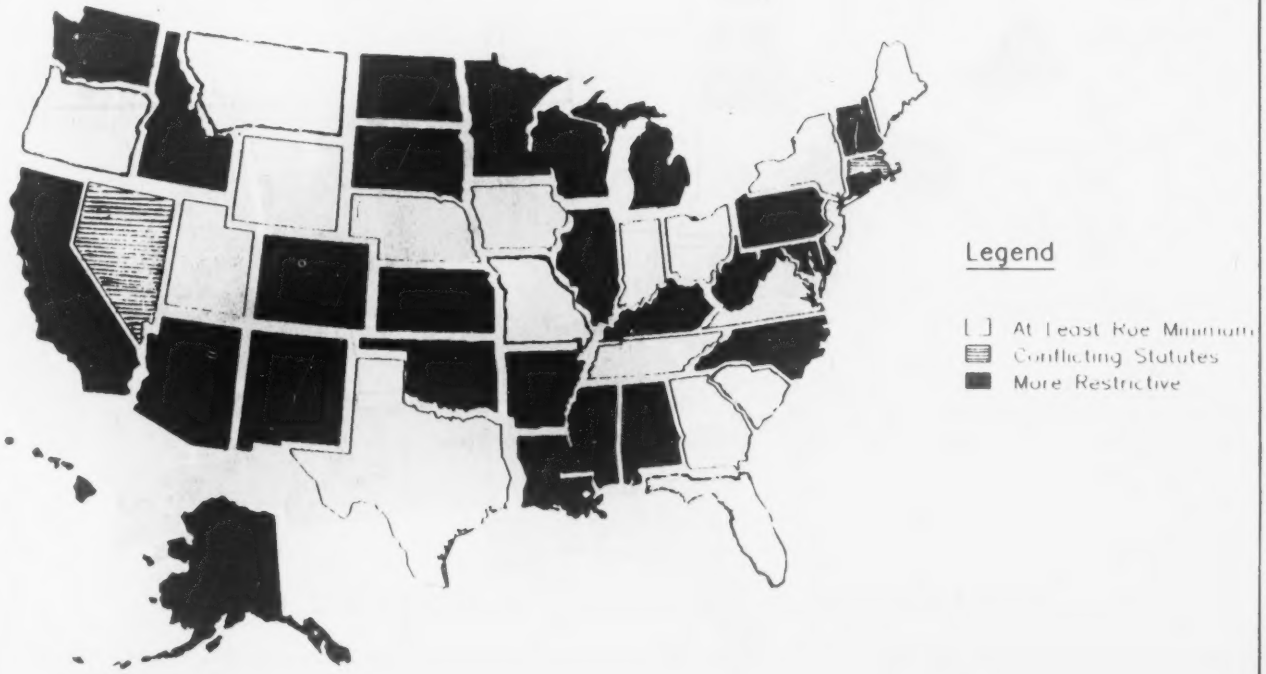
12. Vinson v. Taylor, 760 F.2d 1330 (1985), aff'd sub nom Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) (both decisions included).

MAP A

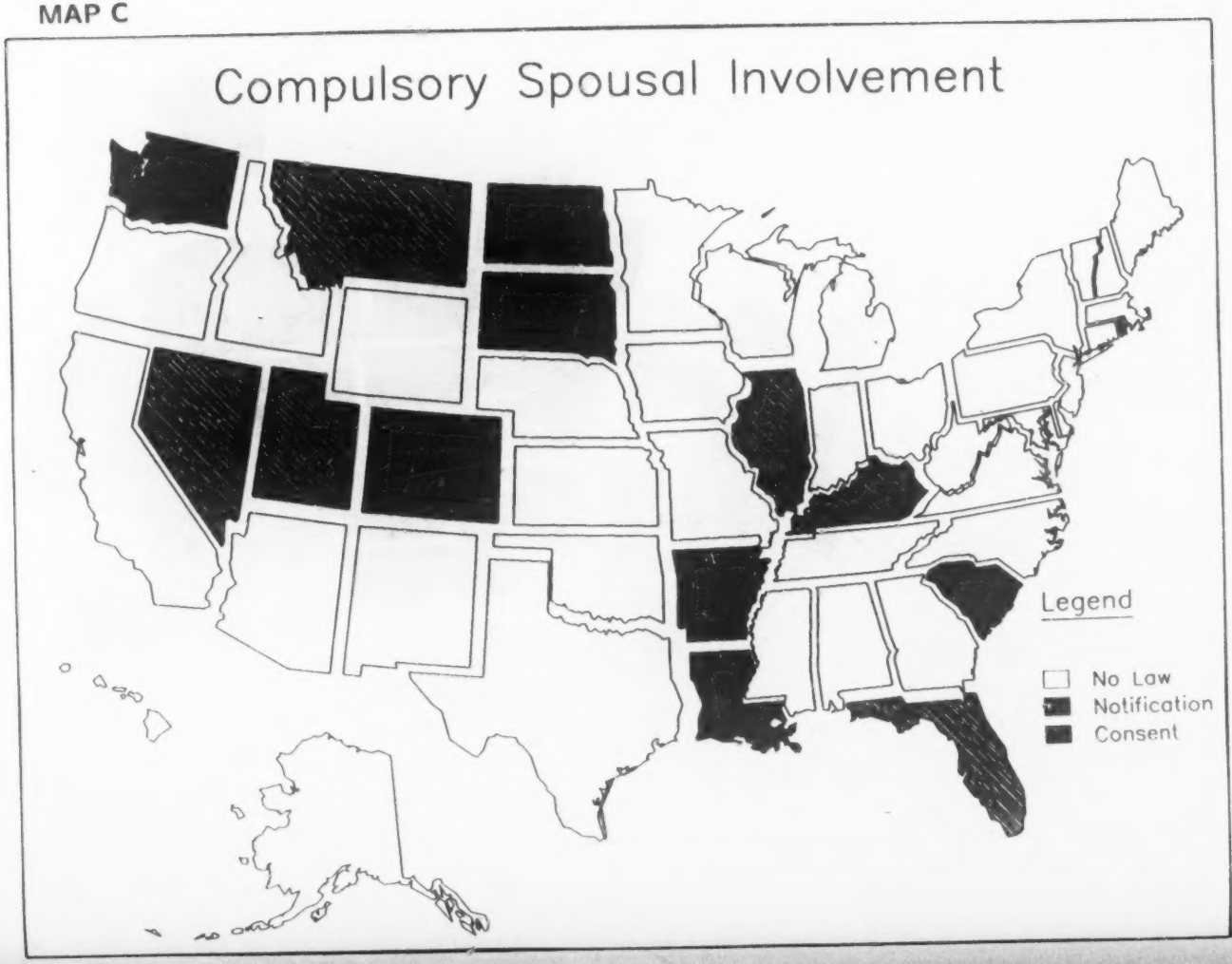
Abortion Legality Before Roe v. Wade

MAP B

State Abortion Laws & the Roe Standard

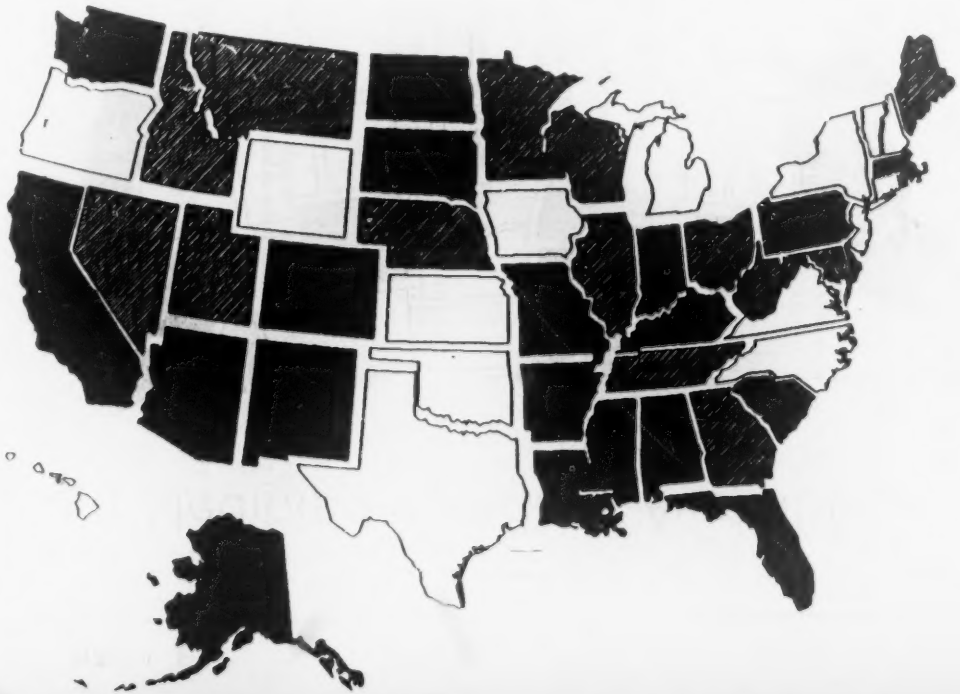


MAP C


Compulsory Spousal Involvement
Legend
No Law
Notification
Consent

MAP D

Restrictions on Minors



NARAL

September 16th, 1987

FR: Kate Michelman, NARAL Executive Director
TO: Interested Parties

Bork as "Confirmation-day moderate"

In three days of testimony, Judge Bork has tried to reshape twenty years of conservative legal thought. On freedom of speech, on equal protection, on privacy and abortion, Bork has tried to cloak himself in the robes of a "confirmation-day moderate."

Yet, while attempting to mollify his critics on the Committee by recognizing the offensiveness of some state laws -- eg. prohibition on contraceptive use, mandatory sterilization -- and by emphasizing his personal detachment from specific issues, like abortion, Judge Bork has continued to reaffirm his objection to fundamental constitutional protections for privacy and women's equality.

It is ironic that Sen. Hatch, a leader of the anti-abortion minority, appeared so pleased with Bork's apparent open-mindedness on abortion. But in fact Judge Bork has given no comfort to those still deeply worried about constitutional protections for reproductive choice:

- o Bork continues to reject the right of privacy.
- o Bork continues to deny equal protection guarantees to women.
- o Bork has failed to provide any assurances that Roe v. Wade, or similar cases, would be protected by stare decisis.

Bork's Inconsistencies on Abortion Rights

On Tuesday, Bork seemed reasonable in offering three criteria for reexamining Roe or a similar case. But at other times in his testimony, he has rejected each of the criteria. Behind each of his signposts, is a roadblock.

What Right of Privacy?

Bork said he would ask a lawyer arguing Roe or a similar case to "derive a right of privacy not to be found in one of the specific amendments in some principle fashion from the Constitution.."

But the same day, Judge Bork said of Griswold v. Connecticut and of the general right to privacy: "I have never tried to find a rationale [for privacy], and I haven't been

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offered one. . . It comes out of nowhere, and doesn't have any rooting in the Constitution."

Bork continued to emphasize on Wednesday that the Court had been wrong in Griswold and succeeding cases that find a right to family and sexual privacy.

On Wednesday, he did say: "There are several crucial protections of privacy in the Bill of Rights. The framers were very concerned about privacy. . ."

But, in October 1985, Bork said "I thought the 'privacy' notion had little to do with the intent of the framers." And in 1986 he said that the right to privacy "doesn't have any historical foundations."

The Equal Protection Clause and Abortion?

Having rejected a general right of privacy, Bork then said he would ask instead if it is possible to "derive a right to an abortion, or at least to a limitation upon . . . anti-abortion statutes, legitimately from the Constitution?"

In response to questions from Sen. Heflin, Bork said: "I'm not saying it would work but it would be easier to do that [argue a right to an abortion] than it would be to define this generalized right of privacy."

Bork suggested that the right to an abortion may be recognized under the 14th Amendment as a form of gender equality: ". . .I think the right to an abortion might --you might attempt to root it there, successfully or not, I don't pretend to guess. But it's easier than a general right to privacy."

Such an attempt would be futile, however, because Bork has continued to reaffirm his position that the 14th Amendment did not extend equal protection to women, saying yesteday: ". . . The various things we would prohibit in the law as to race -- not all of those would be prohibited as to gender."

As recently as 1986, Bork emphasized that it was beyond the Court's proper role to decide these questions: "Now the role that men and women should play in society is a highly complex business, and it changes as our culture changes . . . It was a shift in constitutional methods of government to have judges deciding all of these enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out."

A Waiver of Stare Decisis: Can Bork be Serious?

If he rejects all other arguments, Bork said he would then ask for arguments on stare decisis: "whether this is a case that should not be overruled, because obviously there are cases we look back on and say they were erroneous, or they were not compatible with original intent, but we don't have a ruling for a variety of reasons."

But under his oath of office, how could Bork conscionably allow Roe to stand? For, in the same exchange with Hatch, Bork said: "Roe v. Wade contains almost no legal reasoning. We are not told why it is a private act . . . There are lots of private acts that are not protected. Why this one is protected, we're simply not told that. . . It does not have legal reasoning in it that roots the right to an abortion in constitutional materials."

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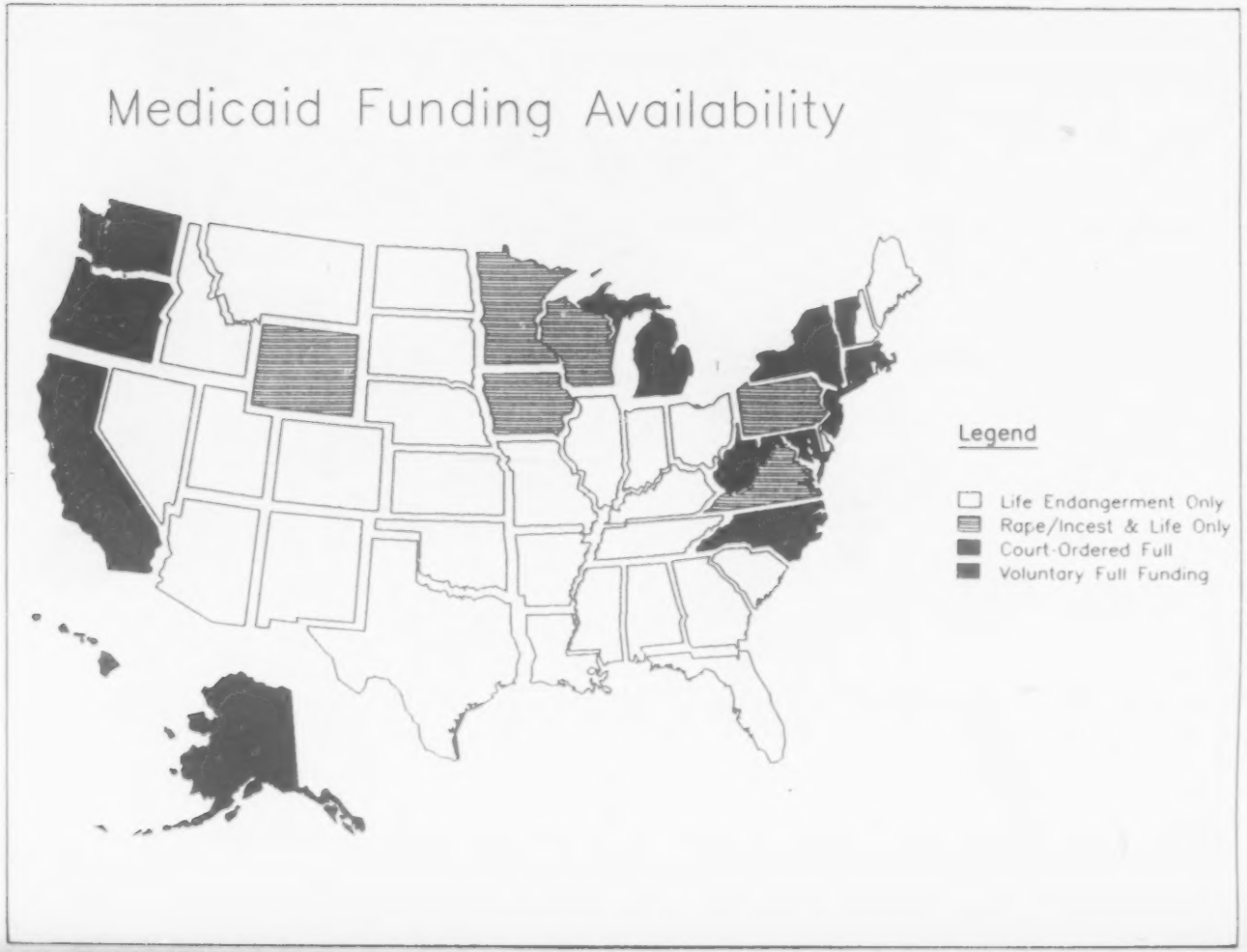
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